

MUSIC ON THE INTERNET

HEARING
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SUBCOMMITTEE ON COURTS, THE INTERNET,
AND INTELLECTUAL PROPERTY
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MUSIC ON THE INTERNET

THURSDAY, MAY 17, 2001

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, THE INTERNET,
AND INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 1:02 p.m., in Room 2141, Rayburn House Office Building, Hon. Howard Coble [Chairman of the Subcommittee] presiding.

Mr. COBLE. Good afternoon, ladies and gentlemen, and welcome to our hearing here in the Judiciary hearing room. We are going to be competing today with the House. The House is still in session, and we will have a vote here, I am confident, within the next 30 to 45 minutes. In view of the time constraints today, I'm going to reserve opening statements to Mr. Berman, the gentleman from California, the Ranking Member, and my statement.

Now, Mr. Conyers, the Ranking Member for the full Judiciary Committee, and Mr. Sensenbrenner, the Chairman of the full Committee, if they appear, of course, we will recognize them for opening statements. And I will indicate to all Members that all opening statements may be entered into and made a part of the record.

The Subcommittee on Courts, the Internet, and Intellectual Property will come to order. Today we are conducting an oversight hearing on music on the Internet. The technological advances in the past few years have brought both incredible new opportunities and serious challenges to the creators of intellectual property. While the Internet opens up new markets for intellectual property owners to exploit, digital piracy threatens these same markets.

The music industry's experience in the digital environment—in the environment—highlights the situation best. Recent technological developments, such as MP3 digital compression, streaming, and peer-to-peer file sharing have provided consumers with easy access to music on the Internet and fueled their interest in using the Internet as a primary way to enjoy music. Yet this win/win opportunity for both the music industry and consumers has been hampered by services providing free access to unlicensed music. Several lawsuits disputed interpretations of copyright law, difficulty in property licensing all the rights, and developing effective means to thwart piracy.

The difficulties in providing legal access to music on the Internet may be new but they are not novel. Through the years, emerging technologies have improved the means of providing consumers with entertainment. These same technologies have expedited legal bat-

tles and challenged intellectual property owners to develop and ultimately benefit from new commercial opportunities. Through marketplace negotiations, court decisions and legislation, usually disputes were resolved, intellectual property was protected, and the American public benefited by access to more content through advance technologies.

As in the past, it is my belief that the parties involved in the difficult issues presented here today should first try to resolve their differences through private negotiations.

And the issue, as each of you know, is incredibly complex. This hearing will provide the Subcommittee with an opportunity to hear from several of the major players in this industry. I look forward to an informative hearing about the availability of music online and the obstacles to offering a wide variety of protected, easy-to-access, low-cost music on the Internet.

Mr. COBLE. I'm now pleased to recognize the gentleman from California, the Ranking Member, Mr. Berman, for his opening statement.

Mr. BERMAN. Well, thank you, Mr. Chairman. I think it's a very good idea that you scheduled this hearing, and I'd just like to make some comments before we start the hearing. The myriad possibilities for online music are very exciting. Online delivery, promotion, performance of music seems to be a true killer effort for the Internet. Certainly the demand for online music is there. Napster has demonstrated that. Now it appears that the supply of online music is beginning to catch up with the demand. While the music industry may have been slow to jump into the online music market, the pace of online music dealmaking has been dizzying of late.

I'm sure that today we'll hear a lot about the two biggest deals, the creation of Duet and of MusicNet.

Certainly these two deals are remarkable, because they promise to make a huge amount of new music instantly available online, but it should be noted that a careless number of smaller deals have also been cut for a mind-numbing array of online music services. In fact, music is legally available in a variety of formats on literally hundreds of Web sites today. Despite these deals, we continue to hear criticism that the online music market has not evolved quickly enough to satisfy consumer demand. We hear that consumers want access to all the music ever published in an on-demand interactive format and that copyright owners of sound recordings and musical compositions have not made their works available to satisfy this demand. I'm sure that consumers really do want such convenience. I'm sure consumers would like all movies, software, books, photographs, recipes, needlepoint designs, and architectural drawings available in such a format. We'd also probably like a guarantee of gasoline under \$2 a gallon, price caps on drug prices, free upgrades of computer software, and Coca-Cola at the greatly reduced price charge in most developing countries.

But my point is a serious one. Only in extraordinary circumstances, such as demonstrable market breakdowns caused by antitrust violations, does our government require property owners to make their property available to the public at government-established rates. Furthermore, copyrights—constitutionally sanctioned property and music, despite its emotive power and cultural signifi-

cance, is basically entertainment. One may credibly argue that property rights sometimes need to be limited to address an energy crisis or an epidemic, particularly an energy crisis, but convenience of access to entertainment seems a particularly weak justification for the abridgment of constitutionally sanctioned property rights.

It's especially difficult to justify government interference with property rights when the free market, however fitfully, appears to be moving in the right direction. The online music space is booming, and interactive streaming services are beginning to spring up. MP3.com, which is testifying today, operates MyMP3.com, a digital music locker service that provides on-demand streaming of one-zone music library. Myplay.com also provides such a service. When they go online, Duet and MusicNet likewise plan to, as I understand it, nonexclusively license other companies to provide on-demand interactive streams.

Even if compelling justifications could be found for government interference with the rights of copyright owners, I'm disturbed by the implications of what might especially—essentially be new Internet-specific regulation.

Congress has been told for years that it shouldn't regulate the Internet. The high-tech sector has argued that the government is far too slow and out of it to effectively legislate industries that are growing and changing at Internet speed. Any Internet legislation we pass, it is argued, would be outdated before it was enacted and might run the risk of freeing—freezing or stifling technological developments in the Internet sector.

It's also argued that the incredible dynamism effort in the Internet was the direct result of minimal government regulation.

Recent history indicates the dynamic is exactly the same in the online music space. Less than a year ago, we heard that the big stumbling block to the success of online music companies was their inability to secure licenses from the operator of sound recording copyrights. Today that complaint is infrequently heard, and in fact several online music business executives have told me that reasonable licenses are available from the owners of sound recordings.

As this hearing will show, the complaint is now about an inability to get licenses from the owners of musical composition copyrights.

I guess my—taking all of this into consideration, I guess tentatively have come to a conclusion that I'm not sure there is great need at this particular moment, or good reason for sweeping legislation regarding online music. I don't deny that several obstacles seem to remain in the way of full-scale realization of online music possibilities, and we'll explore some of those today. Nor do I doubt that some of these obstacles are created by an inability to secure licenses from copyright owners' confusion as to whether certain activities require licenses. And we'll try and elaborate on some of those issues today.

But it's obvious that all parties, every party at this table, every party involved in this business, has a strong pecuniary incentive to resolve the problems that exist, and I think those incentives can be a powerful motivator.

Thank you, Mr. Chairman.

Mr. COBLE. Thank you, Mr. Berman. And ladies and gentlemen, I'm going to overrule myself. I said earlier the opening statement is only for Mr. Berman and me, but we have with us our former Chairman of the full Committee. We have the Ranking Member of the full Committee, and Mr. Boucher has also asked to be heard, so I will now recognize Chairman Hyde for his opening statement.

Mr. HYDE. I thank you very much, Mr. Chairman, for that welcome concession. Thank you. The present disagreement over the ability of record companies and online services to make reproductions of musical compositions necessary to launch digital music services is a troublesome obstacle to efforts to meet consumers' demand for music on the Internet. I understand that record companies and online services have been negotiating with music publishers to find a business solution to this disagreement; and my sincere hope is that the parties will come to a negotiated solution quickly to resolve their differences and that the marketplace will work to provide consumers with the music they desire.

However, it's important to recognize that a voluntary agreement is not necessary for the use of musical works and digital music services. During my tenure as Chairman of this Committee, the Committee worked with both the music publishers and the recording industry to enact the Digital Performance Right in Sound Recordings Act of 1995.

DPRA, DPRA. Among other things, the DPRA clarified that the mechanical compulsory license found in section 115 of the Copyright Act applies to the digital world. We did so at the music publishers' insistence and with the support of the recording industry. At the time, I believe, and I still believe, that DPRA gave record companies and online services whatever rights they may need to make reproductions in the operation of digital music services. It's therefore very disappointing to me that some are now asserting that the compulsory license we enacted in 1995 is insufficient to grant the necessary rights to get digital music services up and running.

This is contrary to what I believe to have been one of the key purposes of the DPRA, to allow legitimate operators to rely upon the compulsory license to launch their services.

My hope is that the disagreement between the music publishers and the recording industry and Internet music companies will be resolved quickly through business negotiations. And I understand that the Copyright Office is considering a rulemaking to clarify the application of the mechanical compulsory license to certain specific types of services. I support action by the Copyright Office to effectuate the intent of DPRA, to enable electronic music delivery, and I hope that the Office will take such action quickly to help meet the consumer demand for digital music that exists today.

Thank you, Mr. Chairman.

Mr. COBLE. I thank you, Mr. Hyde.

Mr. COBLE. The Chair recognizes the gentleman from Michigan, the Ranking Member of the full Committee, Mr. Conyers.

Chairman CONYERS. Thank you, Chairman Coble, and Members. I'm delighted to welcome all of our distinguished witnesses, and especially the songwriters and publishers who may be considered the lowest on the musical food chain. Welcome all.

Well, briefly, should publishers be able to leverage their market power the way the labels did with MP3 when it comes to negotiating royalties? Is there support for a uniform licensing scheme for some recordings so that any Internet company that wants to stream or download music to consumers can take advantage of one license? Why has there been so much energy to clarify section 115 of the

mechanical—mechanical copyright license from the Copyright Office? Doesn't the law already say that owners and users of copyrights on compositions should negotiate on terms and rates?

So I join you here because the Internet presents one of the most profound paradoxes of the 21st century. Until recently, copyright holders have gone from being the victims of large-scale Internet piracy to seeking to embrace the Internet to market their works. Essentially they're trying to take advantage, perhaps, of the very technology that once threatened their livelihood.

Despite this turnaround, though, music is still not widely available online, and we're measuring—that is, we are hearing that it is partly because of the difficulty in getting licenses from music publishers over the compositions that underlie each song. Those seeking licenses claim that procedures are outdated, and the law is not clear on which online music systems require which licenses.

There are suggestions that the Congress should alter the licensing scheme into a blanket license so that the users of compositions pay royalties into a pool and the Copyright Office divvies up the money between publishers.

Well, I'd be concerned with proposals limiting the ability of songwriters and publishers to negotiate licenses for their compositions. Despite the fact that they actually create and write the songs we listen to, songwriters and publishers still receive the lowest royalties in the music industry. And so I look forward to your testimony, gentlemen, and I return any time that may be remaining.

Mr. COBLE. Thank you, Mr. Conyers.

Mr. COBLE. Now, Mr. Cannon, the gentleman from Utah, and Mr. Boucher, the gentleman from Virginia, have pledged to me that they will keep their opening statements brief. So I will recognize the gentleman from Utah.

Mr. CANNON. Thank you, Mr. Chairman. I thank you for holding this hearing. Napster and other digital music companies have raised important questions for the Judiciary Committee in terms of jurisdiction over copyright. I also hope that we look at the issues of online music through the prism of antitrust laws as well, to foster a vibrant marketplace, one that allows competition to lower information costs.

Now, Mr. Chairman, while the labels ignored using the Net as a distribution mechanism, my constituents in Utah have not. I sincerely this year—we have been overwhelmed in my office by Utahans who support Napster, and by the way, most of them also say that they would be happy to pay for music service, and I know for the record that the people who are contacting me are folks who are otherwise disinterested in the political process. I believe this issue provides all of us with a rare opportunity to connect with our grassroots. So as we look at all the issues surrounding Napster and online music, I hope others recognize that the debate is not wheth-

er artists are compensated; rather, it is about how the money should get to those who create the work.

Whether we are talking about a narrow fix for the so-called mechanical license or a broader change to the Copyright Act to provide one-stop shopping for copyright clearances, I look forward to hearing from our witnesses this morning. Thank you, Mr. Chairman, and I yield back.

Mr. COBLE. I thank the gentleman.

Mr. COBLE. The gentleman from Virginia, Mr. Boucher.

Mr. BOUCHER. Thank you very much, Mr. Chairman. I welcome today's hearing which focuses on various aspects of music distribution over the Internet. Let me begin this afternoon by congratulating the major recording companies for creating Duet and MusicNet, which will make available online approximately 80 percent of the inventory of recorded music. These projects represent a step forward in the use of the power of the Internet as a distribution medium. Internet users will have the convenience of obtaining the songs that they want to hear online, and the recording companies will experience a dramatic expansion in the market for their music. They will also have the assurance that their intellectual property rights will be protected and that the owners of the various music copyrights are compensated.

I do have two basic questions about Duet and MusicNet. First, will the customers of these services have the ability to download for permanent retention on their hard drives single tracks for the payment of a fee? This basic offering is essential, in my opinion, if the label-operated sites are to be effective and attractive alternatives to the free peer-to-peer file sharing services.

Secondly, I have concerns about the potential ability of vertically integrated companies that have both content origination and distribution businesses, to favor their distribution business by refusing to license on nondiscriminatory terms their music inventories to their distribution competitors.

For today's purposes, I'm interested in learning of the plans of both Duet and MusicNet to cross-license each other, and their willingness to provide licenses on nondiscriminatory terms to other distribution services.

Over the longer term, this Committee may be called on to assure in law the nondiscriminatory availability of such licenses generally. It is also appropriate that we use the hearing this afternoon as a means of urging the Copyright Office to put in place a temporary safe harbor arrangement for the section 115 license until the Copyright Office completes its process for deciding the full scope of the license and establishes a rate under the compulsory license which would be associated with licensing of the music.

The safe harbor would give a needed umbrella of protection to distribution companies from suits by publishers, which could result in statutory minimum damages. In return, the distribution companies would agree to keep careful records of the music that they store and distribute over the Web and would file notices of their identity and their business models with the Copyright Office. Then when the Copyright Office completes its work on the scope of section 115, the records could be used to make payments, if any are

then due, for distributions that occurred during the time that the safe harbor was being used.

And I look forward to the testimony of today's witnesses concerning this need.

Mr. Chairman, there are a range of other matters that I hope this Subcommittee will have the opportunity to address, either during the hearing this afternoon or on future occasions, that are in the category of assuring the effective functioning of the Internet. And there are some changes in copyright law, from expanding the in-store sampling exemption to retail stores that operate on the Web, to providing a more definitive and useful ephemeral copyright, to declaring that buffer copies, which are essential to the operation of many consumer appliances are made unequivocally lawful.

I would welcome the testimony of witnesses this afternoon on these very important matters, and I thank you, Mr. Chairman, for assembling this interesting panel.

Mr. COBLE. I thank the gentleman.

Mr. COBLE. We have been joined on the majority side by the gentleman from—

Mr. CONYERS. Excuse me, Mr. Chairman. Could our colleague, Karen McCarthy of Missouri, sit quietly and unnoticeably on the panel?

Mr. COBLE. The gentleman is reading my mind. I was about to do that. I was about to say—thank you, John. We've been joined, ladies and gentlemen, on the majority side by the gentleman from Tennessee, the gentlemen from South Carolina, Indiana and Florida; and on the minority side, the gentlelady from California and the gentleman from California and the gentlelady from Missouri. Although not a Member of the Committee, it's good to have you.

Now, I don't have a whip in my hand, so I'm not going to be able to enforce this, but if anybody else wants an opening statement, I will let you have it. I will—I appreciate that, but you may submit your statements for the record. I didn't intend to intimidate anyone. I said, John, I did not have the whip.

Our first witness this afternoon is Mr. Edgar Bronfman, Junior, who is executive vice Chairman of Vivendi Universal. Prior to the December 2000 formation of Vivendi Universal, Mr. Bronfman, was executive and—chief executive officer of the Seagram Company, a post he held since June 1994. He held the same title with Joseph E. Seagram & Sons, the corporation's United States subsidiary.

Our next witness is Mr. Mike Stoller. Mr. Stoller and his partner, Jerry Leiber, have written hundreds of popular songs, including Hound Dog, Smokey Joe's Cafe, Stand By Me, On Broadway, Love Potion No. 9, Charlie Brown, and Yakety Yak and a dozen others. They also are principals in Music Publishing Entity. Now, Mr. Stoller, for your information, The Coasters asked me to join them in vocalizing lyrics of Charlie Brown

4 or 5 years ago, and after I did that, they advised me to retain my day job. I did not impress anybody overwhelmingly.

Our next witness is Mr. Robin Richards, who joined MP3.com as president after serving as managing director of Tickets.com. Prior to working with Tickets.com, Mr. Richards was the founder, president and CEO of Lexi International, one of the Nation's largest

teleservices companies. Mr. Richards graduated from the Michigan State University, then attended the Whittier College School of Law.

Our first witness is Mr. Rob Glaser, who is the founder, Chairman and chief executive officer at RealNetworks, Inc. Prior to founding RealNetworks, Mr. Glaser worked for Microsoft from 1983 to 1993 and then managed Microsoft World; then moved to the company's networking group prior to becoming vice president of Multimedia and Consumer Systems. Mr. Glaser has a B.A. And M.A. In economics and a B.S. In computer science from Yale University.

Our final witness is perhaps unknown to no one in the room, Mr. Lyle Lovett, a songwriter and performer. For more than a decade, Lyle Lovett and his Large Band have defied convention, resisted any kind of pigeonholing and delighted both audience and critics with his music that is amalgam of rock, country, folk and blues. His hits include, She's No Lady, If I Had a Boat, Nobody Would Know Me, and I've Been to Memphis. And, Mr. Lovett, even though these songs don't appear on my script, I would be remiss if I did not mention my favorite Lyle Lovett song, Farther Down the Line; and The Waltzing Fool, God Will But I Won't, and others. It's good to have all of you with us, folks.

I will ask you all to do me a favor, if you can. We—as I say, we're in competition with the floor. That bell inevitably will ring imminently. I would like for you all to stay within the 5-minute time frame, if you can. Now, if you violate that, nobody will be keelhauled, but when you see that red light appear, you will know then that your time has expired. We appreciate, again, your willingness to be with us.

Mr. Bronfman, if you will kick it off.

**STATEMENT OF EDGAR BRONFMAN, JR., EXECUTIVE VICE
CHAIRMAN, VIVENDI UNIVERSAL**

Mr. BRONFMAN. Thank you, Chairman Coble, Congressman Berman, Members of the Subcommittee.

Mr. COBLE. If you will, pull that mike a little closer to you.

Mr. BRONFMAN. Is that better?

Mr. COBLE. Is it turned on? I don't believe it's—

Mr. BRONFMAN. There we are.

Mr. COBLE. That's good.

Mr. BRONFMAN. Chairman Coble, Congressman Berman, Members of the Subcommittee, my name is Edgar Bronfman, Junior, and I'm pleased to be here to testify about the electronic distribution of music, a subject that is of great importance to my colleagues at Vivendi Universal and to me and the Universal Music Group.

Let me begin by thanking the Committee for all of the work that you've done over the years to find a balance between the rights of creators and the needs of consumers. The solutions fashioned by the Subcommittee—from the 1976 Copyright Act to the DMCA—are part of the reason that our creators and copyright industries are as successful as they are and the choices are as bountiful.

Let me also acknowledge my colleagues on this panel. I am proud to say that Lyle Lovett is a recording artist on MCA Records, which is part of Universal. His preference reminds us that without the ge-

nus of the singers and songwriters like the great Mike Stoller, there is no music business.

The Universal Music Group is also a beneficiary of Mr. Glaser's expertise. We pursue several different initiatives with RealNetworks. Universal Music Publishing is a member of the National Music Publishers' Association, and Universal's catalog of sound recordings has been licensed to MP3.com.

I mention these relationships to highlight that there are many players within the music industry, all with different but significant roles. The Internet presents great opportunities for all of us: artists, songwriters, record labels and, most importantly, music fans. We will disagree, we will argue, and we'll negotiate. And at the end of the day, I believe we will work through the complex issues that the Internet presents.

The challenges to the secure digital distribution of music and other intellectual property are significant, and resolving them is sometimes frustrating and always time-consuming. However, the opportunities are vast and our determination to achieve a robust digital marketplace for music intensifies every day.

So why is it taking so long? Not for lack of effort. Universal has invested many tens of millions of dollars in developing an environment for the digital enjoyment—the digital delivery and enjoyment of music. But a rational long-term business plan has two prerequisites. First, we need a strong legal framework to protect our copyrights; and second, we need technology solutions that work for a global audience.

The legal framework appears to be in place. The DMCA has updated the Copyright Act for the digital age. Importantly, recent court decisions have clearly held that our property rights must be respected. While the industry still needs to work through the licensing issues that have arisen, concerns that are legitimate and thorny, I believe that the requirements of the marketplace will dictate that they be resolved without additional legislation.

As for the technology, to be honest, to do it right has been harder than we expected. But right, I mean creating a consumer-friendly system that is fun and easy to use, a mechanism for identifying which songs are downloaded or streamed so that the songwriters, musicians and other rights-holders of each song are properly compensated each time; dynamic sites that reliably deliver great songs, as well as cover art, lyrics, concert information, the ability to communicate with the band, chat with other fans and discover new favorites, and security for our copyrighted property.

While developing the technology has been labor intensive and challenging, it is clear that we can build a secure system that respects the rights of artists and meets the needs of consumers.

It is also clear that although much time, money and effort has been expended, many—we are not there yet. Nonetheless, thanks to our efforts and those of my colleagues on the panel and others, that day is coming ever closer. We have engaged in extensive R&D to learn about the marketplace, tested several prototypes and learned a great deal about consumer preferences. We know that there is plenty of room in this marketplace for many different ventures, and we intend to license our catalog to every viable business model, those that we create and those developed by others. I am

not revealing any secret formula. We plan to do it, because consumers want all their favorite music conveniently available in one place.

While many people in this room are Lyle Lovett fans, including myself, and many of you have spent hours enjoying songs from *The Road to Ensenada* and *I Love Everybody*, none of you would think to look for those songs on an MCA Records Web site. Until I mentioned that Universal was lucky enough to have Lyle in our family, very few of you would have made that connection. That means for us to effectively market and distribute Lyle's albums, they are going to have to be on as many different online music sites as possible, just as the physical copies are in Tower, Sam Goody's, Best Buy, Walmart and others.

From Motown to Verve, to Deutsche Grammophon, Universal's repertoire comes from all parts of world, and we want to make it available to all parts of the world. Frankly, if we lock away our catalog, we aren't generating value for our artists or our shareholders or our fans. That is why we have already licensed works within our catalog to Click Radio, Loudeye, Discovermusic, MTV, eCast, Touchtunes, MP3.com, Digital On Demand, eGreetings, ComedyContent, Starmedia and others. We're in the process of finalizing other licensing deals, with the hope that each one of them will find their niche in the marketplace.

Let me now take a moment to talk about Duet, an online digital music subscription service that we created with Sony Music Entertainment. I know that Rob will be demonstrating MusicNet in a few minutes. Many Members of this Committee have already seen a demo of Duet, so we will not treat you to a game of dueling demos today, but I will highlight that Rob's demo is evidence that consumers are about to be the beneficiaries of a vibrant competitive Internet marketplace. Duet's U.S. on-demand service will be available and marketed through a number of distribution alliances, the first with Yahoo.

The on-demand Duet subscription service will offer consumers the opportunity to access a broad range of quality music online, with speed, ease of use, and reliability, while respecting artists' rights. The Duet service is expected to launch with streaming music and plans to add downloads as soon thereafter as is technologically feasible. We hope to license music from as many artists and catalogs as possible.

At the Universal Music Group, we are enthusiastic about the digital delivery of music. At Vivendi Universal, we know that music is just the first of what will be a long list of compelling and legitimate entertainment choices for consumers as part of a digital future we equally embrace.

Thank you, Mr. Chairman.

Mr. COBLE. Thank you, Mr. Bronfman.

[The prepared statement of Mr. Bronfman follows:]

PREPARED STATEMENT OF EDGAR BRONFMAN, JR.

Chairman Coble, Congressman Berman, members of the Subcommittee, my name is Edgar Bronfman, Jr. and I am pleased to be here to testify about the electronic distribution of music—a subject that is of great importance to me and my colleagues at Vivendi Universal and the Universal Music Group.

Let me begin by thanking the committee for all the work that you have done over the years to find a balance between the rights of creators and the needs of consumers. The solutions fashioned by this Subcommittee—from the 1976 Copyright Act to the DMCA—are part of the reason that our creators and copyright industries are as successful as they are, and that choices are as bountiful.

Let me also acknowledge my friends and colleagues on this panel. I am proud to say that Lyle Lovett is a recording artist on MCA Records—which is part of the Universal Music Group. His presence reminds us that without the genius of the singers, songwriters and other artists we work with, there is no music business.

The Universal Music Group is also a beneficiary of Mr. Glaser's expertise—we pursue several different initiatives with Real Networks. Universal Music Publishing is a member of the National Music Publishers Association. Universal's catalog of sound recordings has been licensed to MP3.com.

I mention these relationships to highlight that there are many players within the music industry—all with different but significant roles. The Internet presents great opportunities for us all—artists, songwriters, record labels and, most importantly, music fans. We will disagree, we will squabble and we'll negotiate, and at the end of the day I believe we will work through the complex issues that this extraordinary distribution mechanism presents.

The challenges to the secure digital distribution of music and other intellectual property are significant. As such, the process of their resolution is sometimes frustrating and always time consuming. However, the opportunities are vast and our determination to achieve a robust digital marketplace for music intensifies every day. In that brave New World, we and our retail partners will be able to reach every consumer that has an internet connection. Consumers in small towns will then have the same access as those who now live near large retail outlets. Shelf space will not be an issue, so back catalog will be right next to the recordings at the top of the charts. Of course, the 8,000 movie titles in the Universal library will also benefit from the music industry's innovations.

So why is it taking so long for legitimate online music sites to become a reality? Not for lack of effort—Universal has invested many tens of millions of dollars in developing an environment for the delivery and enjoyment of digitized music. I do not know of any music company that has invested more.

But a rational, dependable, long-term business plan has two prerequisites. First, we need a strong legal framework to protect our copyrighted music. Second, we need technology solutions that are ready for a global audience.

The legal framework appears to be in place. The DMCA has done a good job of updating the Copyright Act for the digital age. Importantly, recent court decisions have clearly held that our property rights must be respected. It is true that the industry still needs to work through some of the licensing issues that have arisen—concerns that are legitimate and thorny—but I believe that the requirements of the marketplace will dictate that they can and will be resolved without additional legislation.

As for the technology, to be honest, to do it right has been harder than we expected. By “right” I mean—

- consumer-friendly systems that are easy and fun to use
- a mechanism for identifying which songs are downloaded or streamed so that the songwriters, musicians and other rights holders of each song are properly compensated each time
- dynamic sites that reliably deliver great songs as well as cover art, lyrics, concert information, the ability to communicate with the band, chat with other fans and discover new favorites; and
- security for our copyrighted property

While developing the technology has been labor intensive and challenging, it is clear that we can build a secure system that respects the rights of artists and meets the needs of consumers. It is also clear that although much time, money and effort has been expended by many, we are not there yet. Nonetheless, thanks to our efforts and those of my colleagues on the panel and others, that day is coming ever closer.

We have engaged in extensive R&D to learn about the marketplace. I have had the chance to speak with several of you about some of Universal's online projects, including a download service known as Bluematter and a subscription model tested within the Farmclub website. We have also closely followed ventures that others have tried.

These initial prototypes taught us a great deal about consumer preferences. We learned that there is plenty of room in this marketplace for many different ventures,

and we intend to license the Universal catalog to every viable business model—those that we create and those developed by others.

Our business strategy is to license the Universal catalog to outside ventures, and to license works from outside the Universal catalog for our own online ventures. I am not revealing any secret formula. We plan to do it because consumers want all their favorite music conveniently available in one place.

While many people in this room are Lyle Lovett fans, and many of you have spent hours enjoying songs from “The Road to Ensenada” and “I Love Everybody,” none of you would think to look for those songs on an MCA Records website. Until I mentioned that Universal was lucky enough to have Lyle within our family, very few of you would have made that connection. That means that for us to effectively market and distribute Lyle’s albums, they are going to have to be on as many different online music sites as possible—just as the physical copies are in Tower, Sam Goody’s, Best Buy, Walmart and countless independent record stores across the country.

From Motown to Verve to Deutsche Grammophon, Universal’s extensive repertoire comes from all parts of the world and we want to make it available to all parts of the world. Frankly, if we lock away our catalog, we aren’t generating value for our artists or shareholders, or fans. That is why we have already licensed works within our catalog to Click Radio, Loudeye, Discovermusic, MTV, eCast, Touchtunes, MP3.com, Digital On Demand, eGreetings, ComedyContent.com, Starmedia and others. We are in the process of finalizing other licensing deals, with the hope that each one of them find their niche in the marketplace.

Let me take a moment to talk about Duet, an online digital music subscription service that we created with Sony Music Entertainment. Duet’s U.S. on-demand service will be available and marketed through a number of distribution alliances—the first with Yahoo!

The on-demand Duet subscription service will offer consumers the opportunity to access a broad range of quality music online with speed, ease of use, and reliability, while respecting artists’ rights. The service will provide music enthusiasts with the ability to compile personalized playlists and to share them with other Duet members. The Duet service is expected to launch with streaming music and plans to add downloads as soon thereafter as is technologically feasible.

As many of you know, Vivendi Universal was formed in December 2000 as a strategic business combination among Universal Studios, Universal Music Group, Canal+ and Vivendi. We came together to embrace e-commerce opportunities that most consumers did not envision when Seagram acquired Universal Studios in 1995, and Polygram in 1998. Vivendi Universal’s content, internet and telecommunications assets will give us unique opportunities to provide personalized information, entertainment and services to consumers anywhere, anytime and across all distribution platforms.

As a result of our efforts, and others in the entertainment and technology industries, legitimate, secure and vibrant digital distribution will be a reality for consumers and creators around the globe. At Universal Music Group we are enthusiastic about the digital delivery of music. At Vivendi Universal, we know that music is just the first of what will be a long list of compelling and legitimate entertainment choices for consumers, as part of a digital future we eagerly embrace.

Mr. COBLE. Mr. Stoller, I’ll give you his 40 seconds left. Mr. Stoller.

STATEMENT OF MICHAEL STOLLER, SONGWRITER AND PUBLISHER, ON BEHALF OF NATIONAL MUSIC PUBLISHER’S ASSOCIATION, INC.

Mr. STOLLER. Can you hear me? Good afternoon, Mr. Chairman, and Members of the Subcommittee. My name is Mike Stoller. I’m a songwriter. I’m also a music publisher. I’m here today on behalf of the NMPA, the National Music Publishers’ Association. I’m also a member of the board of directors of The Songwriters Guild of America.

I’m here to talk about the successful efforts of songwriters and their representatives and administrators, the music publishers, in licensing songs on the Internet. When I refer to songwriters in this

discussion, I'm including the songwriters, caretakers, music publishers.

My partner Jerry Leiber and I have been writing songs together for over 50 years. Some of the songs we've written, forgive me for being redundant, are Hound Dog, Jailhouse Rock, Stand By Me, Kansas City, On Broadway, Yakety Yak, Love Potion No. 9, Charlie Brown, I'm a Woman, Poison Ivy, and Is That All There Is? Many of these songs were featured in a Broadway show called Smokey Joe's Cafe.

As music publishers, we publish not only our own songs but songs written by hundreds of other writers. Not long ago when we first became aware that the U.S. copyright law which protects our property was being violated on a grand scale and our songs were being pirated like never before, we, the songwriters and music publishers, stood shoulder to shoulder with the record companies, the members of the RIAA, in opposition to the MP3.coms, the Napsters, and their various clones who enable the unlawful downloading of our property. After all, the record companies' copyrights were being violated as well.

In fact, the record companies asked the NMPA and the songwriters to join them in a lawsuit against Napster. Only a month ago, the RIAA asked me to come to Washington testify on April 3rd on their behalf.

It would seem we have prevailed in these cases, and at long last, only after the Senate called the hearing last month, the record labels claim to have embraced the Internet as a faster, easier, and less costly way to distribute their product. The labels plan to offer consumers a monthly subscription to download their recordings. Of course, none of these services is operational, but they will be.

Since the record labels will be distributing recordings of songs, they would like Congress to dictate how much, or, I should say, how little they would have to pay to compensate songwriters for the use of their works when distributed via the Internet. So now the record labels and Internet companies are calling for government regulation of songwriters.

The irony is that the Internet music companies and record labels business is based entirely on the use of our songs. Where they have staunchly fought against government regulation in their own industries, they now ask Congress to intercede on their behalf to get the use of our songs cheaply.

The record labels don't need any more legislation to get onto the Internet. In fact, the record companies could have licensed the Internet companies from the inception, but they didn't. We're still waiting. With our mutual victories against Napster and MP3.com, the record labels have now run out of excuses for not being on the Internet. But before they start to offer music through pay services, they want to make sure they won't have to pay us a fair share of the income. So they now try to justify further delay by blaming songwriters and publishers. We've become the scapegoat.

Well, that isn't the case. Songwriters and music publishers are ready, willing, and able to license their songs on the Internet. We have licensed more than 40 services through the Harry Fox Agency. This makes perfect sense. Licensing, after all, is how we earn our livelihoods. We need the record companies, and they need us.

The question to be asked is: Who are the gatekeepers to offering music on the Internet?

Songwriters are already subject to a compulsory license on the Internet. We must issue licenses to virtually all comers at the current rate of 7-1/2 cents per download. The record labels thus far have declined to obtain compulsory licenses for distributing our music on the Internet. The Internet music companies, on the other hand, do not have the same options as the record labels. Compulsory licenses are only available if an Internet music service first gets a license from the owner of the sound recording. There's no compulsory license for sound recordings, and the record labels are therefore not required to grant licenses. An imbalance, therefore, exists between songwriters and record labels. Without sound recording rights, those new services cannot be launched. It is the record labels, not the songwriters, that are the gatekeepers to the Internet.

Congress has given songwriters and their music publishers the flexibility to work with the new technologies and innovative business models that crop up on the Internet every day. It empowers songwriters and record labels and Internet music services to negotiate reasonable rates through the Copyright Act for any manner of music services.

Songwriters and music publishers are constrained from negotiating for more than the compulsory rate. We are not constrained from negotiating for less.

A copyright is meaningless if you can't enforce it. A blanket license is insufficient and unnecessary. They say they need a blanket because it's too hard to count the uses of our songs on the Internet.

I don't get it. I may not be an expert on computers. I think we can all agree that computers are good at counting. What the record labels and Internet music services are really looking for is a subsidy from songwriters to put them into new businesses. Multi-national record labels do not need any subsidies from songwriters. In any event, songwriters and music publishers have been willing to enter into licenses with Internet music services that have expressed a willingness to play by the rules.

Jerry and I, my partner Jerry and I, like hundreds of other music publishers have licensed our entire catalogs to MP3.com to—

Mr. COBLE. Mr. Stoller, if you would—Mr. Stoller, if you—are you about to wind down?

Mr. STOLLER. I will at this moment.

Mr. COBLE. Okay.

Mr. STOLLER. I respectfully suggest that if Congress is not going to regulate record labels and the Internet music companies, which I'm not suggesting that they should do, they should not regulate the least powerful group, the songwriters. This entire controversy is not about getting licenses. It's about how little they wish to pay for them.

Mr. COBLE. Thank you, Mr. Stoller. And I gave you an extra 3 minutes. So you other gentleman will have an extra 3 minutes as well to be completely fair about this.

[The prepared statement of Mr. Stoller follows:]

PREPARED STATEMENT OF MICHAEL STOLLER

Mr. Chairman, and members of the subcommittee, thank you for the opportunity to present the testimony of the National Music Publishers' Association ("NMPA") on "Music On The Internet."

Summary: NMPA believes that the rapid technological changes occasioned by the Internet are creating exciting opportunities to expand and enhance the ability to deliver to music to the widest audience possible. Significant hard work is being done—and some tension has arisen—in developing and implementing the appropriate business models to accommodate this new technology. NMPA's licensing subsidiary (The Harry Fox Agency) is actively modernizing its equipment and procedures to ensure the fastest possible licensing of these new modes of distributing music and to date has licensed over 30 music internet services.

Congress amended the copyright law in 1995 and again in 1998 to ensure that its music-specific provisions are flexible enough to accommodate digital technology and the Internet. These amendments—which in essence directly affected copyright owners and users to negotiate appropriate licenses, and provide for arbitration of the rates and terms that cannot be negotiated—created the appropriate legal framework in which new business models could be developed. There is no need to change the law today; there is no legal or factual basis for doing so (despite the assertions of some); and indeed a change in the law (or even its serious consideration) might delay the launching of new Internet music services rather than promote progress.

Founded in 1917, NMPA is the principal trade association of music publishers in the United States. NMPA's members—over 800 today—own or control the overwhelming majority of musical compositions available for licensing in the United States. NMPA's wholly owned subsidiary, The Harry Fox Agency, Inc. ("HFA") is an industry service organization that represents over 27,000 publisher-principals, which collectively own more than 2.5 million copyrighted musical works. Established in 1927, HFA serves as agent on behalf of its publisher-principals in licensing copyrighted musical compositions for reproduction and distribution as physical phonorecords (CDs, cassette tapes and phonograph records) and over the Internet as digital phonorecord deliveries ("DPDs"). HFA is also responsible for royalty collection and distribution and auditing licensee compliance.

CURRENT LAW IS WORKING AND SHOULD NOT BE CHANGED.

In enacting the Digital Performance Rights in Sound Recordings Act in 1995, Congress extended the existing "mechanical" compulsory license in section 115, which covers the making and distribution of phonorecords of protected musical compositions, to certain Internet uses.

In enacting these important changes into law, Congress did not attempt to anticipate every possible business model for making music available to Internet users. Nor, as we discussed in our recent response to a Notice of Inquiry from the Copyright Office, did Congress assign that burden to the Copyright Office. Rather, it provided general definitions establishing the principle that songwriters and music copyright owners—like record companies—should be compensated fairly and in a manner that reflects the economic significance of those business models for current as well as new sources of publisher and writer income.

Section 115 already contains a mechanism for dealing with the new services (website downloads and Internet streaming) discussed in the recent Copyright Office petition by the RIAA—or any others that might arise in the future. Congress established its clear preference that the licensing of new music services be dealt with in private, voluntary negotiations and, if those negotiations are ultimately unsuccessful, by arbitration before a Copyright Arbitration Royalty Panel. This decision by Congress was the appropriate one in 1995, was reaffirmed in 1998 amendments to a parallel regime in section 114, and remains so today. To have chosen otherwise—or to choose otherwise now—would invite every new entrant into the online music market to bring what should remain private business matters to Congress or to the Copyright Office. Others might simply be tempted to use Congressional or regulatory pressure on rights owners and creators in an attempt to exact a more favorable deal. This is hardly a prescription for rapid introduction of legitimate services for the distribution of music or any other form of creative content.

We believe the model Congress has adopted can work for the benefit of songwriters, music publishers, record companies and companies seeking to offer innovative music services—and should be permitted to do so. Music publishers, through HFA, have already issued licenses to more than 30 music service providers covering downloads as well as interactive streaming services, and we are prepared to license others.

MUSIC PUBLISHERS LICENSE INTERNET MUSIC SERVICES AT REASONABLE RATES

Music publishers and songwriters have every incentive to license their works in the digital environment—and indeed are required to do so under the terms of the compulsory license contained in section 115. Some digital music services imply that music copyright owners are deliberately impeding the issuance of licenses for online music services. This suggestion is both inaccurate and illogical. Music publishers only get paid when their work is used; if it is not used, no revenue is generated. NMPA members are eager (and economically motivated) to license their works in the new digital environment.

As noted above, music publishers (through HFA) have already issued licenses to more than 30 Internet music service providers. The charge that HFA is technologically incapable of licensing the large volume of works that the Internet requires is simply factually inaccurate, as we explain below in the discussion of our relationship with MP3.com.

The implication that songwriters and music publishers enjoy dual income streams that inordinately enrich them is preposterous. Owners of copyright in the underlying musical work in a sound recording receive—at most—7.55 cents per song sold. (The retail cost of a CD is up to \$18.95.) Congress has determined that digital transmissions which effectively substitute for the sale of phonorecords should be subject to the same copyright royalties as the physical sale of such records.¹ Failure to adhere to this concept could decimate the vibrant, diverse songwriter and music publisher community. The concept was codified for songwriters and music publishers in the “digital phonorecord delivery” definition and related amendments to section 115 of the Copyright Act.

Some webcasters claim that their transmissions are identical to over-the-air radio broadcasts, are performances only, and should be subject only to the public performance royalties collected by the performing rights societies (including ASCAP and BMI). The radio/Internet analogy is fallacious on its face and should be rejected. Traditional radio broadcasts experience sound degradation and do not require any copies on the listener’s equipment in order to facilitate the performance. In contrast, “streaming” Internet transmissions require the creation of perfect digital copies of the sound recording on the transmitter’s computer, and perfect digital copies on the recipient’s computer.

Moreover, users can now preserve and access the receiving computer’s copy through use of the Total Recorder software—a generally available, easy to use product. (We are not talking about “hacking.” Total Recorder is a generally available software product that takes no special knowledge or computer “tinkering” to use and is available over the Internet for as little as \$11.95.) In other words, with today’s technology, a “listener” can select a particular song or request a particular subgenre of music from a webcaster, “listen” to the songs, and then instruct the Total Recorder software to copy the songs the listener wants to keep onto a permanent, separate file in MP3 format. The “listener” now has a perfect, permanent digital copy of a song, displacing any need for its subsequent purchase and effectively turning a streaming service into a source of countless free downloads. In this case, the sale of a phonorecord has either occurred or been displaced and a “mechanical” royalty is appropriately due to the music copyright owner. For parties such as webcasters to assert that they should never pay a “mechanical” royalty for their streaming activities is disingenuous—pure and simple.

MP3.COM AND THE HARRY FOX AGENCY.

HFA represents 27,000 music publisher principles in licensing (and other) transactions with major and independent record companies and over 30 Internet distributors. HFA is not only capable of licensing large volumes of titles in the Internet era—it is well-positioned to do so. This issue arises most often in the context of our settlement agreement with MP3.com, and the facts of the HFA-MP3 relationship prove our point.

Presently, HFA and MP3 are working under the terms of an interim license under which the MyMP3 service may operate while permanent licenses are issued. This is a critical fact that many do not hear: HFA has given MP3.com an interim license as to all of the titles it wishes to use commercially while individual permanent licenses are obtained.

HFA can and is processing permanent license requests from MP3.com. HFA and MP3.com technical staff to date have resolved 236,676 licensing requests (172,194

¹ Congress explicitly endorsed this concept in section 114 by giving record companies exclusive rights in connection with all interactive digital services.

titles were licensed, another 64,482 requests were determined to be duplicates of other MP3.com license requests).

HFA has reviewed the entire file of 914,914 titles for which MP3.com has requested licenses, has provided a detailed report on these requests to MP3.com, and has determined that a substantial number of the outstanding requests cannot currently be processed due to incomplete information submitted by MP3.com. MP3.com's incomplete database likely arises because it improperly disassembled lawfully purchased CDs (which contain the necessary licensing information) and neglected to retain crucial data in the process. Other requests could not be processed because MP3.com adopted "default" entries and submitted erroneous entries where it lacked the requested information. To help MP3.com bring its MyMP3.service to subscribers, HFA has (1) arranged daily communication with MP3.com personnel to correct and clarify license requests and expedite the issuance of licenses; (2) provided MP3.com with written assurance that it will not support litigation against the company while licensing requests are processed; and (3) provided substantial technical assistance to MP3.com (including providing it with HFA's songfile database) in order that it may enhance its own database and submit its license requests in a format that will ensure prompt licensing.

In other words, the outstanding licensing requests are largely due to MP3's incomplete database. HFA is helping MP3.com improve this database, but the responsibility for the problem lies with MP3.

In recent testimony before the Senate Judiciary Committee, MP3.com asserted that HFA licenses are not reliable when more than one party owns the copyright in the music and HFA fails to represent each party. This is a plain misreading of the copyright law. HFA can issue a license if it merely represents one owner of a jointly held copyright, because of section 201(a) of the Copyright Act and the case law interpreting it. The law—and the leading copyright treatise—are clear on this point: one joint copyright owner may license a work without the consent of the other joint owners, and a licensed party is immune from infringement actions by other owners of a copyright when any one owner of the work grants a license to a user. NIMMER ON COPYRIGHT, § 6.10.

In recent years, HFA has routinely issued licenses for approximately 250,000 titles annually. Everyone at HFA is aware, however, that the digital economy is changing the licensing paradigm from individual licenses to "bulk" licenses, and HFA is adapting to this new reality promptly: it has invested millions of dollars in improving its technology, and the resolution of over 236,000 license requests from to MP3.com alone to date is a good example of recent improvements. HFA's infrastructure transformation has not been without its challenges, but HFA has made rapid progress, is dealing with users that have their own database problems, and is performing as well as or better than any comparable digital music licensing entity.

"BLANKET" LICENSING PROPOSALS SHOULD BE REJECTED.

NMPA would like to register its opposition to the suggestion of some that a new "blanket" statutory license be created for digital music distribution. These proposals are neither necessary nor appropriate.

Music website operators (including MP3.com in its Senate testimony) often propose that digital music distribution be governed by a "blanket license" scheme without further elaborating on the complexities of current blanket licensing. NMPA believes that blanket licensing is inappropriate for the licensing of digital phonorecord deliveries, for the following reasons.

Blanket licensing is a process that the performing rights societies (e.g. ASCAP, BMI and SESAC) use to license and collect performance royalties from radio and television stations for performances of songs on radio and television. Created during the World War I era to address the practicalities of keeping track of the public performance of musical works on radio and in live performances, the blanket license is premised on the impracticality of reviewing every radio or television station's play log or programming for every minute the station is on the air or every location where the music is played. Instead, statistical sampling of a smaller number of radio and television stations is employed to estimate how many times a particular work is performed.

Sections 111 and 119 of the Copyright Act establish limited compulsory licenses for the retransmission of certain broadcast signals under modified blanket licensing. Royalties deposited pursuant to the terms of these compulsory licenses are subject to a complex, two-phase distribution proceeding. In phase one, groups of eligible rights holders demonstrate how much of the overall royalty pool should be allocated to each group. In phase two, disputes regarding the allocation of royalties among

claimants within each group are resolved. Such a system may be appropriate in the context of the transmission of copyrighted material employing technologies that, at least for now, do not provide a ready means for identifying individual rights holders. It is not appropriate, however, to impose by law a licensing regime developed for the specific facts of the cable or satellite industries where (as in the case of certain Internet music services) the transmitter is the originator of the transmission and has control over the material being made available to subscribers, and where technology is available to facilitate accurate licensing on behalf of the affected rights owners.

It is inaccurate for music website operators to state that blanket licensing resolves technical licensing problems in the digital era. First, the compulsory license of section 115 is available to any entity wishing to distribute music over the Internet. Second, website operators routinely collect information on millions of visits to their websites which they use in marketing their products and attracting advertising revenue. It is disingenuous for the same website operators to claim that it is impractical for them to account for each use of the works that they are licensing (as a justification for blanket licensing) when they already have that detailed information in digital form in their databases. In other words, website operators are ideally equipped—both technologically and structurally—for this kind of accounting task.

The principal reason for advocacy of a blanket license by web-based music services is that it transfers all of the burden of obtaining licenses and accounting for royalty payments to copyright owners in a manner that costs the creators of the work significantly more than per-use accounting. Digital and computer technologies are particularly well suited, however, to performing the accounting tasks associated with licensing uses of works in a networked environment and ensuring accurate payments to the appropriate rights owners and creators. Congress recognized this fact when it enacted section 1202 of the Copyright Act to protect copyright management information from intentional interference. There is no factual, legal or policy basis for creating a new “blanket” statutory license.

CONCLUSION.

In summary, an appropriate statutory regime is in place to let the market place develop the various business models and licensing agreements required in order to deliver music through the Internet. There is no need for Congress to change the copyright law on this point.

Thank you for this opportunity to present our views.

Mr. COBLE. Mr. Richards.

STATEMENT OF ROBIN RICHARDS, PRESIDENT, MP3.COM

Mr. RICHARDS. Good afternoon, Mr. Chairman, and I appreciate the opportunity to testify before the Subcommittee. I am Robin Richards, and I'm President of MP3.com, and I'm here to request your help in resolving the copyright quagmire that is preventing millions of Americans who have purchased CDs from using the Internet to access those CDs for their own personal use.

Last year, MP3.com introduced an innovative music storage and playback service that enables consumers to use the Internet to listen to the CDs that they buy from their local record stores or from online retail establishments. Although our service is not a file-sharing service like Napster, and imposes no threat to the sale of recorded music, we were sued for copyright infringement by record labels and music publishers. Those lawsuits forced us to shut down our service and to pay over \$150 million to copyright owners and their representatives. Yet even after paying out all this money, we not only have been unable to get our service fully up and running, but we also continue to face new lawsuits.

We have developed a technology that will make it possible for your children to leave their CD collections safely at home when they go off to college or for you to listen to any of your CDs in your car or on a hand-held device without toting around suitcases full of silver disks. But because Congress never anticipated this type of

service, we are forced to deal with an arcane set of licensing requirements that are not merely cumbersome, they are broken.

And these requirements need to be fixed if we and others like us, my colleagues here at the table, are going to offer the services that are now possible and that are being developed. Congress needs to bring rationality back into the Copyright Act. As the chart we have prepared right over here indicates, there's different types—different types of music transmission services are subject to a hodgepodge of licensing and payment obligations that are unrelated to the relative economic impact on the record labels or music publishers. Some services only have to make one payment. Others, including ours, have to make at least five separate payments—this doesn't seem right.

Congress also needs to clarify what consumers can do with their music—with their digital music purchases, not just what they can't do. We don't think that consumers who buy CDs should be subjected to additional fees when they store and pay back their purchases online. You bought it. People have been paid for it.

We look forward to working with Congress to develop a legislative proposal to properly balance the interest of copyright users, copyright owners, and, most importantly, consumers. However, we recognize that enacting copyright reform can take time. And time is something none of us have. We have a dedicated base of customers, and we have millions and millions of dollars' worth of licensing agreements. Yet we still can't give consumers access to all of their music. And this is a problem that will be faced by every Internet music provider, including Mr. Glaser, including Mr. Bronfman, because right now there is no practical way to contact all the music publishers with copyright ownership claims in the more than 900,000 and songs in our digital library.

Harry Fox Agency says that they want to work with us to overcome the practical problems in obtaining licenses for the hundreds of thousands of songs that we need to make available to our customers. I don't dispute their sincerity, but the fact is that HFA does not represent all of the publishers of all of the songs which we need clearance for.

They can't give me a safe harbor against litigation. Indeed, just last week, Randy Newman, Tom Waits and Nancy Wilson of the band "Heart" sued MP3.com for a staggering amount of money. These singer/songwriters apparently aren't represented by Harry Fox, although we have licenses for some of the songs that says, Harry Fox has already given us a license. We don't know where to turn.

While HFA suggests to you that we don't have anything to worry about, I suggest to you that's pretty easy to say when I'm the one getting sued, when MP3.com is the one getting sued all the time.

The good news is that a statutory compulsory license for reproduction and distribution rights that the publishers insist digital music services need, already exists in section 115 of the Copyright Act, as was pointed out by Mr. Boucher. The bad news is that this statutory licensing mechanism, which dates back nearly 100 years, is badly out of date. Although section 115 was amended in 1995 to extend it to certain online activities, the Copyright Office has deferred establishing the rates and terms for services like ours.

How come yours didn't ring?

Mr. BRONFMAN. It rang for you.

Mr. RICHARDS. Mr. Chairman, the procedures that the Copyright Office has used in granting statutory license, are cumbersome, time-consuming and expensive. Using this antiquated system for obtaining licenses in the digital era would completely overwhelm the Copyright Office which typically only handles a few hundred statutory licensings and filings in a single year, and I want to do a million on Tuesday.

In short, our problem in getting licenses isn't contractual in nature. Our problem is that licensing mechanisms that were developed in the predigital era simply cannot handle the demands of the Internet-fueled digital music environment. People don't want to use the Internet to store and listen to some of their music purchases. They want to use the Internet to listen to all of their music purchases: I bought them; I want to play them back to myself on the Internet.

The Copyright Office, at the request of the recording industry and with MP3.com support, currently is considering whether to conduct a rulemaking to clarify the application of the 115 compulsory license to streaming audio services, such as MP3.com. In our comments in that proceeding, we have urged the Office to look to the model with satellite and cable compulsory licenses, a model which gives the users of copyright works assurances that they have the protection of a compulsory license, even if they cannot identify in advance every person who might claim an ownership interest in the works being used. Even more importantly, the Copyright Office can and should immediately act to establish interim licensing procedures that would create a safe harbor for companies like ours.

RIA and MP3.com have endorsed this interim license safe harbor concept, and I hope your colleagues will join us in urging the Copyright Office to take this step as a means to dealing with an untenable situation that now exists.

To summarize, there are several steps that must be taken to put digital music back on track.

First, the Copyright Office should immediately establish interim licensing procedures to allow digital music services to operate under the protection of section 115.

Second, the Office also should adopt updated section 115 procedures addressing the failure of the existing marketplace and statutory licensing mechanisms.

Third, Congress must begin the process of clarifying consumer rights and rationalizing the variant payment obligations currently imposed on the different services.

I am grateful to this Subcommittee for scheduling this hearing and offering me an opportunity to describe the difficulties that we have, and others have, facing us as we go forward in the digital music area. We stand ready to work with you and strike the appropriate balance. Thank you.

Mr. COBLE. Thank you, Mr. Richards.

[The prepared statement of Mr. Richards follows:]

PREPARED STATEMENT OF ROBIN RICHARDS

Thank you for the opportunity to testify at this important hearing on Online Music and the Internet.

EXECUTIVE SUMMARY

I am here representing not only MP3.com, but also the millions of people who wish to store their CD collections on the Internet for their own personal use, but currently are unable to do so. The reason that they are unable to take advantage of this technology is that it was never anticipated by Congress and is currently forced to operate under a patchwork quilt of arcane laws that not only are cumbersome, but are broken in many respects.

Last year, MP3.com introduced an innovative music storage and playback service that enables consumers to use the Internet to store and listen to the CDs that they buy from their local record stores or from online retail establishments. Although our service is not a file sharing service like Napster and poses no threat to the sale of recorded music, we were sued for copyright infringement by the major record labels and music publishers. Those lawsuits forced us to shut down our service and to pay over 150 million dollars to copyright owners and their representatives; yet, even after paying out all of that money, we not only are unable to get our service fully up and running, but we also continue to face new lawsuits!

The fundamental problem is that the Congress never anticipated many of the services that online technology is now making possible. The My.MP3.com technology allows people to take advantage of the Internet in order to get added value from their music purchases. The service that we provide—and similar services being developed by other innovators—can make it possible for your children to leave their CD collections safely at home when they go off to college or for you to listen any of your CDs in your car or on a hand-held device without toting around suitcases full of silver discs. But to do these things, we are going to need Congress' help.

In order to fully address the problems faced by MP3.com and other online music providers, Congress will have to act to bring rationality back into the Copyright Act. As illustrated by Exhibit A, different types of music transmission services are subject to a hodge-podge of licensing and payment obligations that are unrelated to their relative economic impact on the record labels and music publishers. Some services only have to make one payment; others, including ours, have to make FIVE separate payments. This isn't right.

Congress also will need to clarify what consumers can do with their digital music purchases, not just what they can't do. Consumers who buy CDs shouldn't be subject to additional fees when they store and playback their purchases on-line. If you buy a Ford, you expect to drive it anywhere without having to pay Ford more money. And if you buy a paperback book, you would be shocked to be charged different amounts depending on where you chose to read it. Yet, this seems to be where we are heading with CDs if Congress doesn't step in.

MP3.com looks forward to working with Congress to develop a legislative proposal that rationally balances the interests of copyright users, copyright owners, and—most importantly—consumers. However, we recognize that enacting copyright reform could take time. And time is one thing that Internet-based technologies don't have in unlimited quantity. For example, MP3.com has a loyal following of music lovers who have purchased CDs and who want to use our service as a convenient way of listening to the songs on those CDs. We have millions and millions of dollars worth of licensing agreements with the record labels. But we still can't give consumers access to all of their music—and this is a problem that will be faced by every Internet music provider—because right now there is no practical way to contact all of the music publishers with copyright ownership claims in the more than 900,000 songs in our digital library.

The Harry Fox Agency, which represents over 25,000 music publishers says that they want to work with us to overcome the practical problems in clearing the hundreds of thousands of songs in their inventory and that they won't participate in legal action against MP3.com for using those songs. We don't dispute their sincerity. But the fact is that HFA doesn't represent all of the publishers of all of the songs for which we need clearance and that means that we remain vulnerable to lawsuits, even with respect to songs that HFA claims to have given us a license.

Indeed, just last week Randy Newman, Tom Waits and Ann and Nancy Wilson of the band "Heart" sued MP3.com for 40 million dollars. This suit makes real many of the issues that MP3.com has been discussing over the last several months. The complaint in this lawsuit cites song titles that we haven't been able to clear because the publishers aren't represented by HFA as well as song titles that were previously settled and licensed to MP3.com via HFA-represented publishers.

The good news is that the reproduction and distribution rights that the publishers insist that we need already are subject to a statutory compulsory license under Section 115 of the Copyright Act. The bad news is that this statutory licensing mechanism, which dates back nearly 100 years, is badly out of date.

Although Section 115 was amended in 1995 to extend it to certain on-line activities, the Copyright Office has “deferred” establishing the rates and terms for the “incidental” reproduction of songs that occurs as a necessary part of technologies such as ours. Moreover, the procedures that traditionally have been imposed on statutory licensees under Section 115 are cumbersome, time-consuming and expensive. For example, those procedures not only would require MP3.com to manually search the Copyright Office’s records for the names and addresses of the copyright owners of each of the hundreds of thousands of song titles on the CDs that our consumers have purchased and stored on-line, but also would require us to submit a separate application to the Copyright Office for each song whose current owners couldn’t be located. Using this antiquated system for obtaining licenses in the digital era would completely overwhelm the Copyright Office, which typically handles only a few hundred statutory license applications in a single year.

In short, the problem that MP3.com faces in getting the licenses that the publishers insist we get isn’t contractual in nature. The problem is that the marketplace and statutory licensing mechanisms that were developed in the pre-digital era simply cannot handle the demands of the Internet-fueled, digital music environment. People don’t want to use the Internet to store and listen to some of their music purchases—they want all of the music they own to be available to them on-line.

Fortunately, there is a way that the practical obstacles to licensing can be addressed quickly and, hopefully, without Congressional action. The Copyright Office, at the request of the recording industry and with MP3.com’s support, currently is considering whether to conduct a rulemaking to clarify the application of Section 115 to streaming audio services such as MP3.com. In our comments in that proceeding, we have urged the Office to look to the model of the satellite and cable compulsory licenses, which permit copyright users to submit periodic royalty payments into a pool that is then distributed among copyright owner claimants. This model gives the users of copyrighted works assurance that they have the protection of a compulsory license even if they cannot identify in advance every person who might claim an ownership interest in the works being used.

Even more importantly, the Copyright Office can and should immediately act to establish “interim” Section 115 licensing procedures for online services that engage in “incidental” copying. Adoption of such “interim” licensing procedures will create a “safe harbor” against infringement actions while the Office and, if necessary, a CARP, decide on the appropriate substantive and procedural rules governing application of the Section 115 license to “incidental” copying. Both RIAA and MP3.com have endorsed the interim licensing procedures concept and we hope that the members of this Committee will join us in urging the Copyright Office to take this clarifying action as a means of dealing with the untenable situation that now exists.

In sum, MP3.com has agreed to pay one fee after another in an effort to get our service back up and running. But the new technology we have developed is still being held hostage and millions of consumers are still blocked from storing their CD collections on the Internet for their own personal use. The reason is that Congress never anticipated a service like My.MP3.com and we are forced to operate under a patchwork quilt of arcane laws that not only are cumbersome, but that are broken in many respects.

Time is running out. We believe that the Copyright Act needs to be amended to rationalize on-line music’s licensing obligations and to clarify the rights of the music lovers who seek to use our service to enjoy the music that they buy. Moreover, we need Congress’ immediate assistance in overcoming the inadequacies of the existing marketplace and statutory mechanisms for obtaining licenses so that American consumers are not denied the opportunity to take advantage of the technological innovations that the Internet is making possible.

THE MY.MP3.COM STORY

Who is MP3.com? MP3.com, Inc. has created a unique and robust technology infrastructure designed to facilitate the storage, management, promotion and delivery of digital music. As the Internet’s premier Music Service Provider (MSP), the company is dedicated to providing consumers with access to music when they want it, where they want it, using any web-enabled device. The company’s web site hosts what MP3.com believes is the largest collection of digital music available on the Internet, with more than 967,000 songs and audio files posted from over 150,000 digital artists and record labels. Dedicated to growing the digital music space, the

company's products and services include on-demand Subscription Music Channels, an innovative Business Music Services program, a Syndicated Radio program and others. Additionally, through the company's MSP technology initiative and its music InterOperating System, MP3.com is partnering with a variety of forward-looking businesses to expand its digital music strategy. MP3.com's common stock is listed for trading on the Nasdaq National Market under the ticker symbol MPPP. The company is based in San Diego, California. For more information on MP3.com, visit www.mp3.com.

My.MP3.com—An Online Tool For Storing and Listening To Purchased Music. In January 2000, MP3.com launched a new service called My.MP3.com. My.MP3.com is a digital music storage "locker" service that uses MP3 compression technology to enable people to use Internet connected devices to listen to the CDs that they purchase at their local record store or from on-line retailers such as junglejeff.com and, in the near future, towerrecords.com. Today, the primary playback device for My.MP3.com users is their personal computer. But in the not too distant future, consumers will be able to use My.MP3.com to access their purchased CD collections using hand-held Internet-enabled devices and Internet-connected devices installed in their cars.

The way the My.MP3.com service works is as follows: with respect to a CD that a consumer already has purchased, the consumer takes the CD and places it in the CD-ROM tray of his or her computer; our "Beam-It" software then "reads" the CD and, having established that it is a real, legitimate CD release, adds the CD to a secure, personalized "locker" which can be accessed by that consumer—and only by that consumer. With respect to CDs purchased on-line from one of our retail partners, the consumer can use our "Instant Listening" software to add a CD in MP3 format to his or her personal locker at the same time the consumer pays one of our on-line retail partners for the CD, thereby allowing access to the songs on the CD even before the disc is physically delivered.

I want to emphasize that My.MP3.com differs from music file-sharing or "swapping" services that allow users to download, save, and trade music that they have not purchased. CDs can be accessed on My.MP3.com only for a real-time listening experience, not for downloading and copying. And before any CD can be accessed on our service that CD will have been purchased twice: once by the listener and, as discussed below, once by us.

Litigation, Shutdown, and Settlement. Not long after launching the My.MP3.com service, we were sued for copyright infringement both by the major record labels and by certain music publishers. The problem that we faced in trying to defend ourselves against these lawsuits is that the Copyright Act never anticipated the development of a technology such as My.MP3.com. While Congress has made certain changes to the Copyright Act in effort to address the use of digital transmission technology to deliver music to consumers, these changes rightfully focused on concerns that "on-demand" services that allowed consumers to choose what music they received over the Internet could lead to the widespread production and distribution of perfect "pirate" copies of sound recordings. Congress never foresaw—or addressed—the development of an "on-demand" service such as My.MP3.com—a service that poses no piracy threat since users can only "demand" music that they already have purchased and only for the purpose of receiving what essentially is a "private" performance via real-time, streaming audio, without the ability to duplicate, save, or share the transmissions.

Because Congress never foresaw the development of a personal purchased music "locker" service like My.MP3.com, the door was left open for record labels and music publishers to argue that My.MP3.com was infringing their copyrights by allowing consumers to access their purchased CDs in MP3 format. In particular, the copyright owners cited the fact that instead of developing a system that requires consumers to convert their own CDs into the MP3 format, My.MP3.com went out into the marketplace and bought those same CDs and converted them for the consumer. According to the record labels and music publishers, the act of converting these CDs to MP3 format, so that consumers who had separately purchased those same CDs could listen them to in that format, constituted an act of infringement. In addition, the music publishers took note of the fact that when a consumer listens to a song from his or her My.MP3.com locker, that song is delivered to the consumer by means of a "streaming" audio technology that automatically makes a temporary or "buffer" copy of a portion of the song as a necessary and integral part of the transmission process. Although this buffer copy lasts only a few seconds and is eliminated once the playback of the song begins, the music publishers asserted that, in order to use this technology to playback a CD to a consumer who has purchased that CD, My.MP3.com needed a separate license to make and distribute copies of the song.

In response to these lawsuits, we “shut down” the My.MP3.com service and entered into settlement negotiations with various copyright owners and their representatives. Shutting down our service deprived consumers of the ability to access the music that they had purchased and stored in their on-line lockers. There is a certain irony in the fact that when our site was shut down, many of our customers were driven to services such as Napster, where they not only could find and play the CDs that they already had bought, but also could (and probably did) obtain access to a vast array of music selections without ever having to purchase them.

In any event, although we disagreed with the interpretation of the copyright law put forward by the record labels and publishers, our desire to get our service back up and running led us to enter into very costly agreements covering all of their claims. We have agreed to pay for converting the CDs that we purchase into MP3 format. We have agreed to pay for performing both the sound recordings and the songs contained on those CDs. And we even have agreed to pay the publishers for the temporary, momentary “buffer” copy that automatically is made (and deleted) each time someone listens to their own music out of their My.MP3.com locker. Yet, today, nearly six months after signing the last of these agreements, we haven’t been able to effectively process any of the licenses that the copyright owners insist we must have before we can fully relaunch the My.MP3.com service because of the overly-burdensome process required to locate and get agreement from every rights-holder.

Why My.MP3.com Still Can’t Fully Relaunch. Despite what you may hear from some of the copyright owners, our inability to obtain the necessary licenses is not merely a contractual problem that can and will be solved by the marketplace. Rather, it is a reflection of the fact that the existing marketplace and statutory music licensing mechanisms—mechanisms that developed nearly 100 years ago—simply do not work in the digital environment. As a matter of public policy, it is incumbent on government to address the failure of these marketplace and statutory mechanisms, both through immediate remedial action and through a comprehensive reassessment of the application of the copyright law to digital music technologies.

The particular marketplace and statutory failure that is currently frustrating our ability to provide the My.MP3.com service to consumers involves the licensing of the right to reproduce and distribute musical compositions, by means of streaming MP3 transmissions, to consumers who have bought the CDs on which those compositions appear. As I have indicated, we do not agree that the essentially “private” performances facilitated by our technology should trigger any additional copyright payments (over and above the compensation received by copyright owners as a result of the purchase of their works by us and by users of our service).

Nonetheless, faced with a threatened onslaught of litigation, we agreed to pay the music publishers for making an “incidental digital phonorecord delivery” each time someone uses the My.MP3.com service to listen to one of their own CDs.

Incidental digital phonorecord deliveries—IDPDs for short—are a type of “mechanical” reproduction and distribution requiring licenses from the owners of the publishing rights in the songs contained on a CD. Our licensing agreement was made with the Harry Fox Agency (“HFA”), an arm of the National Music Publishers Association that, for nearly 75 years, has served as the music publishing industry’s principal clearinghouse for the administration of mechanical rights licenses. According to its website, HFA issues licenses, collects and distributes royalty payments, and audits the books and records of licensees on behalf of more than 25,000 music publishers who, in turn, represent the interests of over 150,000 songwriters.

When MP3.com and HFA announced their licensing agreement last October, the joint press release proclaimed that the deal was intended to give us licenses for over a million songs. And, in fact, we immediately provided HFA with a list of over 900,000 song titles, along with information identifying the CD on which each song appeared and the name of the artist performing the song. More than six months later, however, HFA still has not been able to issue licenses to us for over two-thirds of these songs.

We are not suggesting that HFA hasn’t tried to clear the rights to more songs. Rather, the problem appears to be that HFA’s system for issuing mechanical rights licenses for its publisher members simply cannot handle the demands of the digital marketplace. In order for us to obtain a license for a particular song from HFA, we not only have to provide them with the song title, CD and artist, but we also have to know who owns the publishing rights for the song. This information, which may change several times over the life of a song, is not readily available to the public.

An Example of the Problem: Licensing and New Releases. Nor are the problems that we have encountered in trying to obtain the licenses that the music publishers demand limited to songs on “older” CDs. Making newly released CDs available to consumers through the “Instant Listening” option is one of the key attractions of

the My.MP3.com service—and is something that helps promote the sale of music. (For example, before we shut down the My.MP3.com service, participating retailers who offered their customers our Instant Listening option saw their sales of new releases as much as double.) But even after settling with the labels and publishers, we have been stymied in obtaining licenses for the songs on newly issued CDs.

A good illustration (reflected in the attached Exhibit B) is our experience with the new Jennifer Lopez CD, “J-Lo.” Shortly after Epic/Sony records released this CD, we attempted to make it available on My.MP3.com. We had obtained the necessary rights from the record labels with respect to the sound recording copyright and we had agreements with the appropriate Performance Rights Organizations (i.e. ASCAP and BMI) giving us the right to “publicly perform” the songs on the CD. However, we couldn’t get HFA to give us the required (by them) license for any of the songs. When we asked HFA why the songs on this new CD were not in their database and, thus, licensable, we were told that HFA would be able to issue licenses covering some—but not necessarily all—of the songs, but that it would take 6–8 weeks after receipt of a license request for HFA to locate the publishers associated with each song and get clearance. That’s 6 to 8 weeks for just one CD. Consequently, we have been unable to offer consumers who buy the J-Lo CD the ability to add this CD to their locker.

Finding “Non-HFA” Publishers. Apart from the problem of obtaining information matching up the songs we want to play with the songs owned by the publishers represented by HFA, the difficulties we face in getting the My.MP3.com service back up and running are exacerbated by the fact that HFA does not represent every publisher and by the fact that the publishing rights in many, if not most song titles are held by multiple owners in varying percentages. For example, if you look at the liner notes of a “rap” CD—one of the most popular genres of music on-line, you will see as many as ten publishers on any given song. Many of these publishers may be impossible to locate or are otherwise unreachable.

Thus, even if HFA granted us licenses to the song catalogs of all of the publishers that they represent, there will be songs in My.MP3.com lockers for which we do not have clearance, or for which we have only a partial clearance. For example, we have repeatedly encountered the situation where, after activating a song in reliance on an HFA-issued license, we received notice from a non-HFA affiliated publisher claiming a partial ownership interest in the song and objecting to its being made available on our service. While HFA claims that we don’t have to worry about these joint owners, that’s easy for them to say. They aren’t the ones facing infringement actions.

In short, there is *no* marketplace mechanism that will allow us to fully relaunch My.MP3.com—thereby giving consumers access to all of the songs on all of the CDs that they have purchased and stored on their My.MP3.com lockers—without running a significant risk that we will be sued by publishers or songwriters claiming ownership rights in some of those songs. And this is exactly what has recently happened with the new suits from Randy Newman, Tom Waits, and Ann and Nancy Wilson of the band “Heart.”

SOLVING THE LICENSING DILEMMA

Making Section 115 Work in the Digital Environment. Given the potential unavailability of marketplace licenses for any number of songs, the obvious solution is the establishment of a statutory licensing mechanism. And, in fact, nearly a hundred years ago, Congress addressed concerns that the withholding of music licenses could lead to the emergence of “a great music monopoly” by establishing a statutory compulsory copyright license for anyone who wants to reproduce and distribute copies of a previously published song. Unfortunately, however, while Congress has updated this compulsory license—which originally applied to the reproduction and distribution of songs in mechanical formats such as piano rolls—to cover the digital delivery of reproductions of songs (including IDPDs), neither the statutory procedures for invoking the compulsory license, nor the Copyright Office’s implementing regulations, have been adapted to meet the demands of the on-line music environment.

A more detailed synopsis of the workings of the statutory mechanical copyright license (currently codified in Section 115 of the Copyright Act) is attached as Exhibit C to this testimony. Suffice it to say here that before MP3.com could claim protection under the statutory license, we would have to manually search the Copyright Office’s records for the names and addresses of the copyright owners of every one of the nearly one million songs on the My.MP3.com service—a task that in and of itself is economically and practically infeasible. Moreover, for any song that does not have current ownership information on file, MP3.com (or any other on-line music provider seeking a compulsory license to a wide spectrum of musical works) would

have to file a separate compulsory license application. This means that if current information is not available for merely a third of the million songs searched—a not improbable result given that songwriters and publishers are not required to notify the Copyright Office about changes in the ownership of a song’s publishing rights, or even to register the copyright in the song in the first place—over 300,000 separate filings would have to be made at the Copyright Office. To put the burden that this would create in some perspective, last year the Copyright Office processed roughly 350 Section 115 license applications.

One mechanism for reforming the Section 115 procedures to account for the realities of the digital marketplace is for the Copyright Office to adopt revised substantive and procedural rules governing the application of Section 115 to streaming audio services. The Office, in response to petitions submitted by RIAA and MP3.com, is considering whether to undertake such a rulemaking proceeding. Assuming that the Office goes forward, we believe that it can and should consider the adoption of rules implementing revised procedures modeled on the satellite and cable compulsory licenses, which permit copyright users to submit periodic royalty payments into a pool that is then distributed amongst copyright owning claimants. This model gives the users of copyrighted works assurance that they have the protection of a compulsory license even if they cannot identify and locate every person who might claim a copyright interest in the works being used.

Interim Copyright Office Rules Creating a “Safe Harbor.” While we believe that it may be possible for the Copyright Office to bring Section 115 into the digital age without waiting for Congress to act, an even more immediate (albeit temporary) solution is needed in order to protect My.MP3.com and other similar on-line digital music providers from infringement claims during the pendency of the Office’s Section 115 rulemaking. The Office’s rules currently state that the establishment of rates and terms for “incidental” copying covered by Section 115 are “deferred.” However, it simply is not right for the benefits of Congress’ 1995 amendment extending the Section 115 licenses to incidental copying to be denied to on-line music services because rules implementing that amendment have not yet been adopted.

Both RIAA and MPAA have proposed that the Office immediately issue interim licensing procedures whereby on-line music services can, by filing informational statements at the Copyright Office, obtain the protection from liability that compulsory licensing is intended to give. These statements would include the names of the songs for which protection is sought, together with information regarding the name of the CD on which the song appears, the artist performing the song, and the number of times that the song has been “delivered” to consumers. Once rates and terms have been established, royalty payments covering the activities described can be made.

This “safe harbor” approach, if implemented, will immediately solve the problem faced by My.MP3.com and other on-line music providers: the risk of being sued for using songs owned by publishers who cannot be identified through the existing marketplace and statutory licensing mechanisms. More importantly, it will allow consumers to take advantage of innovative technologies that increase the value of their purchased CDs through on-line storage and playback. Put simply, as soon as this safe harbor approach is implemented, we will provide the required information and by the next day we will be in a position to “unlock” all of the purchased music that users of the My.MP3.com service have stored on-line.

Legislative Reform of the Copyright Act. Modernizing Section 115 and adopting interim licensing procedures are important and necessary actions. However, in the long run, Congress must reform the underlying statutory provisions that have led to the current licensing dilemma. In particular, Congress must address the rights of music purchasers. The public, quite frankly, is confused. At every turn the courts, applying statutory provisions that never contemplated the services to which they are being addressed, are telling consumers what they cannot do. It is time for government to step in and clarify what someone who purchases a CD can do. Specifically, Congress needs to address the following questions:

1) *Can and should consumers be able to listen to their own purchased CDs on any digital device?* In 1992, Congress enacted the Audio Home Recording Act, which gave consumers the right to copy CDs to tapes. Now questions abound about consumers’ use of the next generation of technology, such as personal computers and MP3 players. Each new device or format raises anew the issue of what the law allows consumers to do with the music that they purchase.

It shouldn’t take a separate act of Congress to permit consumers to use a new gadget to listen to their music. Let’s clarify copyright law once and for all and give consumers the explicit right to convert their music CDs into other digital formats for the purpose of enjoying their purchases on any Internet-enabled device.

2) *Can and should music buyers be allowed to store their music in places where they can most easily access it?* One of the benefits offered by digital technology is that it can make music fully portable. No more lugging around CDs in order to have your music collection at your fingertips. Imagine being able to access all of your music purchases from your PDA, phone, car or wherever you happen to be. This is becoming more of a reality every day as the world around us goes on-line.

Unfortunately, the drafters of the Copyright Act never contemplated this situation so it's subject to extensive legal debate. Music buyers should be rewarded with the maximum use of the music that they purchase with their hard-earned dollars. Let's ensure that they have the rights to house their music purchases in places where they can best access it. And let's encourage companies that build technologies to help them to do this faster or better.

3) *Should CD buyers be subject to additional fees when they store and playback their purchased music collections?* If you buy a Ford, do you expect you can drive it anywhere without having to pay Ford more money? If you buy a paperback best seller, would you be surprised to be billed more money based on where you read it? Can you think of any product you purchase outright, only to be surprised with additional charges in the future? In some instances, there could be fraud charges for selling something and then hitting the unsuspecting purchaser with more charges.

Yet this seems to be where we are headed with music CDs. Consumers believe they are buying CDs, but copyright owners argue that, under current law, payments can be imposed on a consumer's use of on-line technologies that allow them to store and playback the music that they have already bought. Is a consumer truly buying a CD or is it just a lease they'll have to continue paying on forever? Music buyers have the right to demand clarity in this area. Either CDs should be properly labeled as a lease and future payments defined in advance, or consumers should be only charged once no matter how or where they listen to their music. This is essential for them to make informed buying choices.

Last year, MP3.com supported a bill, the Music Owners' Listening Rights Act, which addressed many of the questions posed above. We believe that the approach taken in that legislation offered an appropriate resolution of the rights of consumers with respect to the on-line storage and playback of their purchased CDs. However, we are not wedded to a single approach and look forward to working with Congress, the Copyright Office, and the music industry to clarify and confirm the rights of music consumers in the digital environment.

THE FUTURE OF DIGITAL MUSIC

Congress cannot stand idly by and simply hope that the gridlock currently frustrating the relaunch of My.MP3.com (which will frustrate the introduction of other services as well) will resolve itself. Many of you probably have seen the ad on television in which a weary traveler stops at a remote establishment and is offered a choice of every song ever recorded in every format. We are supposed to be shocked at this unimaginable concept. But, given the advances in digital technology, the idea that every piece of recorded music could be available at the click of a mouse is not unimaginable at all. What does remain unimaginable, however, is that anyone could ever track down all of the copyright owners in every single song and get them to agree to license terms. If the "science fiction" depicted in that ad is to become "science fact," government must deal decisively—and quickly—with the fundamental questions regarding the on-line use of music addressed in this testimony.

If these fundamental questions are not addressed in the very near future, the real losers will be the American public, who will be denied competitive choices they have every right to expect. Also lost to them will be the spirit of innovation, invention and entrepreneurship that brought them this new technology and new services in the first place.

As I have outlined in this testimony, there are several steps that must be taken to put digital music back on track:

- The failure of existing marketplace and statutory licensing mechanisms in the context of on-line streaming audio services can and should be addressed by the Copyright Office through the adoption of updated Section 115 procedures that apply the cable and satellite compulsory license model to the "incidental" copying that is integral to Internet transmissions.
- The Copyright Office should immediately establish interim licensing procedures that allow digital music services to operate under the protection of the Section 115 license while the Office and, if necessary, a CARP, work on new Section 115 procedures and rates.

- Most importantly, Congress must begin the process of reforming the Copyright Act to bring a measure of rationality to the licensing obligations imposed on the different services that engage in transmissions of recorded music and to recognize and clarify the rights of consumers to use the Internet to store the music that they have purchased and to receive transmissions of “private performances” of that music.

I am grateful to the Committee for scheduling this hearing and offering me the opportunity to describe the difficulties that we face in bringing the benefits and value of on-line digital music storage and playback to the purchasers of recorded music. We stand ready to work with you to find the necessary balance between the rights of copyright owners and the rights of consumers.

Thank you.



EXHIBIT A

BROADCAST, WEBCAST AND INTERACTIVE MUSIC:
COMPARISON OF PAYMENT OBLIGATIONS

	OVER-THE-AIR BROADCAST RADIO STATION	NON-INTERACTIVE INTERNET WEBCASTER	INTERACTIVE STORE AND PLAYBACK MUSIC LOCKER SERVICE
Performance of Song	\$\$	\$\$	\$\$
Performance of Recording of Song		\$	\$\$\$
Server Copy of Recording of Song ("Ephemeral")		\$	\$\$\$
Server Copy of Song ("Ephemeral")			\$\$\$
Buffer Copy of Song			\$\$\$
\$ = Statutory License Payment			
\$ = Blanket License Payment			
\$ = Negotiated License Payment			

BROADCAST, WEBCAST AND INTERACTIVE MUSIC: COMPARISON OF PAYMENT OBLIGATIONS

Explanation of Illustrative Chart

Over-the Air Broadcast Radio Station. Broadcast radio stations licensed by the FCC that use the public airwaves to transmit recorded music obtain “public performance” rights for the songs being transmitted by obtaining “blanket licenses” from performing rights societies (e.g., ASCAP, BMI) that represent the songs’ publishers. Broadcasters are statutorily exempt (Copyright Act Sections 112 and 114) from obtaining public performance licenses from the record labels that own the copyright in the “sound recording” embodying the song or from having to obtain licenses from either the record labels or the music publishers for copies that they make (“ephemeral” copies) to facilitate the transmission of recorded music.

Non-Interactive Internet Webcaster. A number of websites offer “virtual” radio stations that transmit recorded music over the Internet rather than over broadcast radio frequencies. Like broadcast radio stations, these websites are “non-interactive”; that is, the webcaster selects the particular recordings that are transmitted, not the listener. In addition to licensing the public performance of the songs transmitted by obtaining blanket licenses from the performing rights societies, non-interactive webcasters are required to obtain licenses from the record labels both to publicly perform sound recordings and to make copies (“server” copies) that are needed to facilitate transmissions over the Internet. These licenses from the record labels are obtained through statutory licensing mechanisms (Copyright Act Sections 112 and 114).

Interactive Store and Playback Music Locker Service. Interactive music “locker” services (of which My.MP3.com is an example), allow purchasers of recorded music to store the content of their CDs on a website and to listen to that content over Internet connected devices (such as personal computers). These services are deemed “interactive” because each listener selects the songs that they hear when they want to hear them. Although the recipients of transmissions from a music locker service are essentially listening to their own purchased CDs, these transmissions are deemed to be “public performances.” The public performance of the songs is covered by blanket licenses from the performing rights societies. However, licenses for the public performance of the sound recordings in which the songs are embodied must be negotiated with the record labels. Also, separate negotiated licenses are required from both the labels and from the music publishers for the “server” copies that must be made to facilitate transmissions over the Internet. Finally, the music publishers insist that an additional license is required for the temporary (“buffer”) copy that is made on a listener’s personal computer each time a performance of a song is received over the Internet.

**A Primer On Copyright Law
And the
Transmission of Recorded Music**



May 17, 2001

COPYRIGHT PRIMER

Assessing the application of the Copyright Act to transmissions of recorded music over the Internet is inherently complex due to the multiplicity of exclusive rights at issue (i.e., performance, reproduction, distribution), the existence of two separate copyrighted works (the “sound recording” and the underlying musical composition), and the variety of transmission formats (interactive, non-interactive; purchased music lockers, listening-only services; Internet-only services, webcast retransmissions of over-the-air broadcasts, etc.). In addition, a complete understanding of the copyright status of Internet transmissions requires an appreciation of how the Copyright Act applies to various non-Internet transmissions, such as over-the-air broadcasts, satellite and cable subscription transmissions, etc. This “Primer” attempts to provide a basic, comparative outline of the Copyright Act provisions governing differing modes of transmitting recorded music. It is organized according to copyright interest: first the rights of sound recording copyright holders are addressed, followed by a description of the rights of the musical composition rights holders.

DISCUSSION

I. General Background

A. Which Copyright Owners Have an Interest in the Transmission of Recorded Music?

When recorded music is transmitted to recipients (over the Internet or by more traditional broadcast, satellite, or cable means), the interests of the owners of two different copyrighted works are implicated. These two works are the “**sound recording**” and the underlying “**nondramatic musical work**.”

Sound Recording. A “sound recording” is a work created by the recording of a particular rendition of a musical composition onto a tape, disk, or other material object. The material object encompassing a “sound recording” is referred to as a “phonorecord.” The owner of the sound recording copyright typically is the record company that produces and markets the tape, disc, etc. containing the sound recording.

Nondramatic musical work. The sound recording is to be distinguished from the underlying “nondramatic musical work” (i.e., the musical composition). The owner of the copyright in the underlying musical work typically is the composer of the song (or a music publishing company). For example, the separate recordings of “Summertime Blues” by Eddie Cochran, Blue Cheer, and the Who all involve the same copyrighted musical composition, but represent three separately copyrightable sound recordings.

B. Which Exclusive Rights are Placed in Issue by Transmissions of Recorded Music?

The Copyright Act confers certain “exclusive rights” on copyright owners. These rights include the rights of “**public performance**,” “**reproduction**” and “**distribution**.”

Public Performance. In the case of musical compositions and sound recordings, a “performance” occurs when the work is made audible. The performance will be deemed to be “public” if it occurs at a place that is open to the public or if it is transmitted to the public – whether the members of the public receive it in the same place or different places and whether it is received by them at the same time or different times – by means of any “device or process.” The concept of a “public performance” is quite broad. For example, it has been held that a hotel “pay per view” system that used a centrally located (within the hotel) bank of VCRs to play taped movies for individual hotel guests on-demand (and where the taped movie could only be viewed by one hotel room at a time) nonetheless constituted a public performance because the taped movie was “transmitted” from the central location in the hotel to the individual hotel rooms.

Reproduction and Distribution. While technically separate rights, reproduction and distribution often are lumped together when discussing sound recordings and musical compositions. With respect to the reproduction right, there is considerable controversy over the breadth of the right as applied in the Internet context. In particular, there is debate over whether a RAM, buffer, or other temporary copy should be viewed as a “reproduction” of the copyrighted work if its creation is merely an essential incident to some other action, such as a performance. The distribution right includes the right to sell the work or to transfer ownership by other means, such as rental, lease, or lending.

II Sound Recording Copyright and the Transmission of Recorded Music.

A. Public Performance Right.

1. **In general.** Sound recordings have historically been treated differently from other types of copyrighted works with respect to the public performance right. Indeed, until recently, sound recording copyright owners were not accorded any public performance rights. As a consequence, radio stations, jukeboxes, etc. have been allowed to “publicly perform” recorded music without having to pay compensation to the sound recording copyright owner (i.e., the record company). In 1995, Congress gave sound recording copyright owners a limited public performance right with respect to performances by means of a “digital audio transmission.” This limited public performance right is subject to a number of exemptions and statutory licensing provisions.

2. **Analog transmission services (e.g., broadcast radio).** As indicated, sound recording copyright owners have no public performance right with respect to analog performances of their works and analog transmission services (such as traditional over-the-air broadcast radio stations) make no payments to record companies when they transmit performances of recorded music. (*Exempt*)

3. **Digital, over-the-air broadcast radio.** Section 114(d)(a)(A) exempts FCC-licensed, broadcast nonsubscription digital radio transmissions (which constitute a type of “digital audio transmission”) from liability. (*Exempt*)

4. **Jukebox.** Playing a sound recording on a traditional on-site jukebox is a public performance, but no compensation is due to the sound recording copyright holder since they have no public performance right as to analog performances. Also, an on-site jukebox performance of a compact disc is not a “transmission,” and thus would not trigger any obligation to compensate the sound recording copyright holder (whose public performance right is limited to “digital audio transmissions.”) (*Exempt*)

5. **Satellite/cable non-interactive digital audio services.** Entitled to a statutory public performance license under Section 114. The royalty rate is the subject of a pending arbitration. (*Statutory licensing*)

6. **Webcast retransmission of broadcast radio programming.** The Copyright Office has held that the exemption from liability for over-the-air digital radio broadcasts does not apply to webcasts by broadcasters; rather, broadcaster webcasts are entitled to a statutory public performance license under Section 114. (The broadcast industry, which takes the position that the Act grants them an exemption from liability, has brought suit on this issue). The royalty rate for such webcast performances is the subject of a pending arbitration proceeding. (*Statutory licensing*)

7. **Internet-only non-interactive webcasts.** Both subscription and non-subscription Internet-only, non-interactive webcasts are entitled to a statutory public performance license under Section 114. The royalty rates are the subject of a pending arbitration. (*Statutory licensing*)

8. **Interactive digital audio transmission services.** Transmissions of music by “interactive” services (i.e., services that allow the recipient of the transmission to select the content to be transmitted to the recipient) are deemed to be “public performances.” There is no statutory license for such services, whether they are offered via the Internet or via other means such as cable or satellite; rather, any service offered on an interactive basis (including services that limit transmissions to recipients who have already purchased the subject sound recording) must negotiate public performance licenses from each sound recording copyright holder. (*Negotiated licensing*)

B. Reproduction and Distribution Rights

1. **In general.** Sound recording copyright owners enjoy the right to license the reproduction and distribution of their works in both analog and digital formats. For the most part, these rights are not covered by statutory licensing provisions or exemptions, but are exercised through negotiated licenses.

2. **Analog transmission services (e.g., broadcast radio).** Analog transmission services such as broadcast radio typically do not distribute “reproductions” of recorded music; rather, they merely “perform” the recordings. However, broadcast radio stations often prerecord their programs, and in so doing, make copies of recorded music. Such copying is exempt from liability under the “ephemeral” copy exception in Section 112 of

the Act, provided that certain conditions are met (e.g., only one copy is made, the copy is destroyed or permanently archived after six months, the copy is not transmitted beyond the “local service area” of the transmitting entity). This is only a limitation on the reproduction right and does not affect the sound recording copyright owner’s exclusive control over the distribution of copies of a sound recording. (*Ephemeral copy exemption*)

3. **Digital over-the-air broadcast radio.** Same as analog radio: the ephemeral exception applies to a single copy made to facilitate the broadcast. (*Ephemeral copy exemption*)

4. **Jukebox.** The use of traditional, on-site jukeboxes does not implicate the reproduction and distribution rights – they are performance-only devices. However, there likely will be new jukebox technologies that play sound recordings that are maintained at a central site and downloaded to the jukebox location on-demand. Use of such devices likely will raise reproduction and distribution issues which are not currently addressed in the law. (*No reproduction/distribution involved*)

5. **Satellite/cable non-interactive digital audio services.** Such services are not eligible for the ephemeral copy exception that applies to broadcast services because their transmissions are not limited to a “local service area.” Instead, these services are eligible for a compulsory license that allows them to make a single “ephemeral” copy. (*Ephemeral compulsory license*)

6. **Webcast transmission of broadcast radio programming.** Webcast retransmissions of broadcast radio programming arguably implicate both the reproduction and the distribution rights of the sound recording copyright owner. First, in order to transmit a recording over the Internet, a webcaster typically needs to make one or more copies of the recording (sometimes referred to as “root”, “cache”, or “server” copies). To a limited extent, a single copy made by a webcaster to facilitate Internet transmissions are entitled to an ephemeral copy compulsory license. Second, the delivery of streamed audio via the webcast may involve temporary copying of the work or a portion thereof in the recipient’s computer – buffer or random access memory (RAM) copies. And the argument has been made by some copyright owners that the transmission of these temporary “copies” to the recipient’s computer constitutes “distribution” for which a negotiated license is needed. (*Ephemeral compulsory license for “server” copy/status of buffer copy unresolved*).

7. **Internet-only non-interactive webcasts.** Internet-only webcasts implicate the reproduction and distribution rights of sound recording copyright owners in the same way as webcast retransmissions of broadcast radio programming: a compulsory license is available for a single ephemeral copy made to facilitate the transmission; the status of RAM, buffer and other temporary copies is the subject of debate. (*Ephemeral compulsory license for “server” copy/status of buffer copy unresolved*)

8. **Interactive digital audio transmission services.** Copies made to facilitate the transmission of an interactive webcast and any temporary copies made in the course of that transmission arguably need to be licensed as reproductions and/or distributions. Neither the ephemeral copy exemption nor the ephemeral copy compulsory license apply to interactive transmissions. Moreover, to the extent that the streaming audio process results in the creation of temporary (e.g., RAM, buffer) copies, those copies arguably require a negotiated license also. (*Negotiated licenses demanded*).

III. Musical Composition Copyright and Transmissions of Recorded Music

A. Public Performance Right

1. **In general.** The owner of the copyright in a musical composition that is embodied in a sound recording has the right to license public performances of the work. This right typically is exercised on behalf of the composer/publisher by a “performing rights society” such as ASCAP or BMI, who grant “blanket licenses” for the performance of the works of the copyright owners that they represent.

2. **Analog transmission services (e.g., broadcast radio).** Analog transmission services, including traditional over-the-air broadcast stations, obtain the right to publicly perform musical compositions by obtaining blanket licenses from the performing rights societies. (*Blanket licensing*)

3. **Digital over-the-air broadcast radio.** Licensed through the performing rights societies. (*Blanket licensing*)

4. **Jukebox.** Public performances of musical works by means of a jukebox are addressed by a statutory licensing provision in the Copyright Act. (*Statutory licensing*)

5. **Satellite/cable non-interactive digital audio services.** Licensed through the performing rights societies. (*Blanket licensing*)

6. **Webcast retransmission of broadcast radio programming.** Licensed through the performing rights societies. (*Blanket licensing*)

7. **Internet-only non-interactive webcasts.** Licensed through the performing rights societies. (*Blanket licensing*)

8. **Interactive digital audio transmission services.** Licensed through the performing rights societies. (*Blanket licensing*)

B. Reproduction and Distribution Rights

1. **In general.** As noted, composers/publishers rely on performing rights societies

to enforce their public performance rights; these performing rights societies, however, do not represent the composers/publishers with respect to the enforcement of their reproduction and distribution rights. The “Harry Fox Agency,” which is a subsidiary of the National Music Publishers Association, acts as agent for many composers/publishers to administer their reproduction and distribution rights. However, a number of smaller publishers and independent composers simply represent themselves. The Copyright Act contains a compulsory license provision (known as the **“mechanical” license**) which governs the reproduction and distribution of “phonorecords” embodying copyrighted musical works. Because of the burdensome rules governing the use of this compulsory license, it generally is not utilized; rather, it serves as a backstop that effectively has promoted marketplace licensing. In addition, in 1995 the mechanical license provision was amended to extend its coverage to a **“digital phonorecord delivery”** – defined in the Act as the individual delivery of a phonorecord by digital transmission of a sound recording that results in a specifically identifiable (to the transmission service, not to the recipient) reproduction, whether or not that transmission also is a public performance; non-interactive, real-time, subscription transmissions where no reproduction is made are expressly excluded from the definition. The Act provided for the establishment of “DPD” royalty rates through an arbitration proceeding and directed that the rates established distinguish between DPDs “in general” and DPDs where the reproduction or distribution of a phonorecord is “incidental” to the transmission which constitutes the DPD. The obliquely described “incidental DPD” concept was not further defined in the Act; the legislative history suggests, however, that where a transmission system which is designed to allow recipients to hear recorded music substantially at the time of the transmission transmits the recording by means of a “high speed burst of data” which is temporarily stored in the recipient’s computer for prompt playback, the delivery of the “phonorecord” (the stored data) would be “incidental” to the transmission. The same statutory royalty rates apply to “general” DPDs as apply to the manufacturing of records, tapes, etc. However, the Copyright Office, upon request of interested parties, has deferred adopting royalty rates for “incidental” DPDs.

2. **Analog transmission services (e.g., broadcast radio).** Traditional broadcast radio transmissions generally do not result in the distribution of copies of recorded music. However, some radio stations make a copy of the recording to facilitate the creation of the broadcast program. Such copying is exempt from liability under the “ephemeral” copy exception in Section 112 of the Act, so long as certain conditions are met (i.e., only one copy is made, it is destroyed or permanently archived after six months, it is not used for transmissions beyond the transmitting entity’s “local service area”). (*Ephemeral copy exception*)

3. **Digital over-the-air broadcast radio.** Same as analog radio; the ephemeral copy exception applies to a single copy made to facilitate the broadcast transmission. (*Ephemeral copy exception*)

4. **Jukebox.** Traditional jukeboxes generally do not make or distribute reproductions of recorded music. However, to the extent that new jukebox technology is

being developed that will use transmissions and downloads of recorded music from a central server, both the reproduction and distribution rights of the composers/publishers could be implicated. Whether such copying/distribution would be covered by the “DPD” compulsory license is an unresolved issue. *(Status unresolved)*

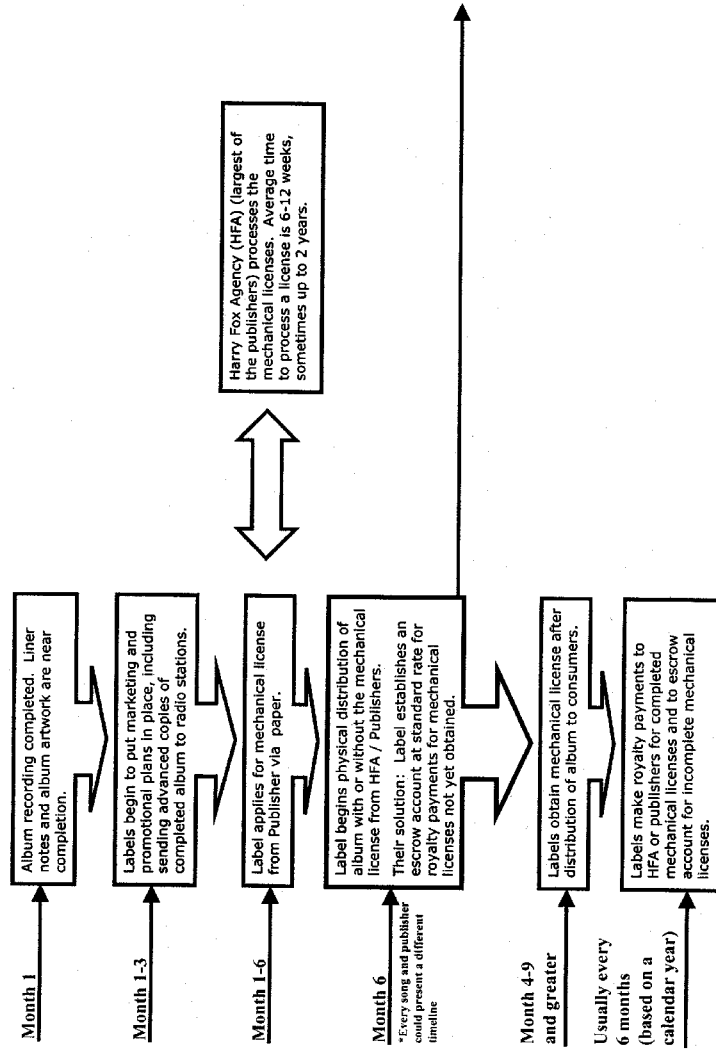
5. Satellite/cable non-interactive digital audio services. To the extent that these services only offer real time performances without any copying of the work, even on a temporary basis, the composers/publishers reproduction/distribution rights are not implicated. To the extent such services make a single copy to facilitate their transmissions, Section 112 contains an “ephemeral” compulsory license (not an exception as is available to broadcasters) which allows a single copy to be distributed. *(Ephemeral compulsory license)*

6. Webcast transmissions of broadcast radio programming. Webcasting typically involves the making of temporary (e.g., RAM, buffer) copies. Arguably, therefore, such webcasts involve “incidental DPDs” as well as performances, although the issue has not been formally resolved by the Copyright Office. To the extent that webcasters, like broadcasters, make a copy of a work to facilitate their transmissions, that copy may be covered by the ephemeral compulsory license. Another possible result is that the “root” or “server” copy made to facilitate the transmission is covered by the DPD compulsory license. *(Status unresolved)*

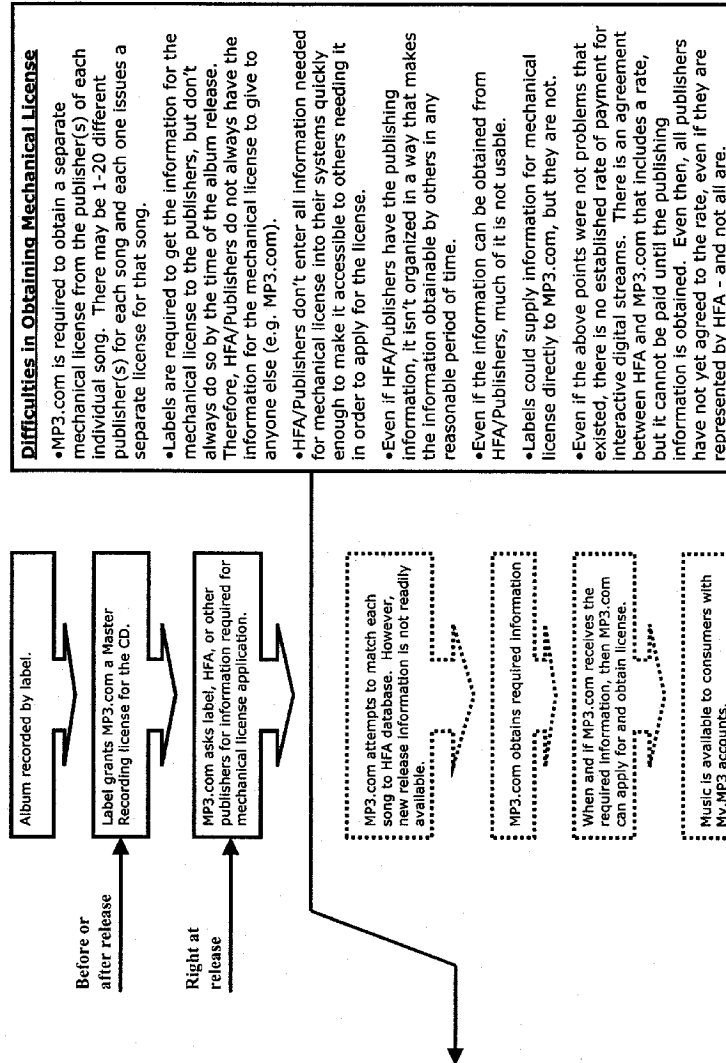
7. Internet-only non-interactive webcasts. Internet-only, non-interactive webcasts implicate the reproduction and distribution rights of composers/publishers in the same manner as webcast retransmissions of radio broadcast programming. *(Status unresolved)*

8. Interactive digital audio transmission services. Like other webcasting services, interactive (or “on-demand”) streaming services typically involve the creation of temporary (buffer, RAM, etc.) copies as well as a “root” or “server” copy from which the streams originate. The ephemeral compulsory license doesn’t apply to the root or server copy because the law limits that license to non-interactive services. And the streamed copies may or may not be a form of DPD. If on-demand streams are DPDs, there still is an issue as to whether the root/server copy is covered by the DPD license. *(Status unresolved)*

EXHIBIT B

The Way the Mechanical Licensing Process works for the Labels / Physical Distribution

The Way the Mechanical Licensing Process Works for MP3.com / Digital Distribution



INTERNET MUSIC AND THE SECTION 115 “MECHANICAL” LICENSE

I. The Section 115 “Mechanical” License:

What is the “mechanical” license? The “mechanical” license, which was first enacted in 1909 to address concerns about the possible emergence of a “great music monopoly,” and which now can be found in Section 115 of the Copyright Act, is a “compulsory” copyright license that allows anyone to record and distribute their own “cover” version of a previously published copyrighted “nondramatic musical work” (i.e., a song) without having to negotiate with the copyright owner for the right to do so. The Section 115 license also applies when copies are made and distributed of a pre-existing recording of a song; however, in order to reproduce and distribute copies of a pre-existing recording, an additional license (referred to as a “master recording license”) must be obtained from the record label that owns the copyright in the pre-existing recording. The rate for the mechanical license was initially set by Congress and is subject to periodic revision by a Copyright Arbitration Royalty Panel.

How do you obtain a “mechanical” license? Section 115 provides that, if the name and address of the copyright owner of a particular song can be identified from the Copyright Office’s records, anyone wishing to exercise the statutory “mechanical” license to make and distribute copies of that song must serve a “notice of intent” on the copyright owner prior to distributing any copies; failure to serve this notice before distributing copies bars reliance on the mechanical license. The statute also requires the compulsory licensee to make monthly royalty payments to the copyright owner (based on the number of copies distributed) and to provide the copyright owner with CPA-certified annual statements of account. The statute directs the Copyright Office to prescribe, by regulation, the form, content, and other requirements regarding service and certification of the initial notice of intent and the monthly and annual statements.

If the name and/or address of the copyright owner cannot be ascertained from the registration or other public records of the Copyright Office, the notice of intent must be filed directly with the Office; in such cases, however, no royalties will be due until such time as the copyright owner has identified itself in the Office’s public records.

The Copyright Office has declined to promulgate “official” forms for either the notice of intent or the royalty statements. Instead, the Office has prescribed a set of rather detailed and burdensome filing requirements. The most burdensome requirement is that a separate notice of intent must be filed for each song for which the license is claimed. In addition to information about the song itself, each notice must be signed by an officer of the licensee, must contain detailed information about the licensee (e.g., the names of all of the officers and directors of any entity with a greater than 25% beneficial ownership interest in the licensee), and must be served on the copyright owner by registered or certified mail. For each notice that is filed with the Copyright Office (because the name/address of the copyright owner is not available), a \$12 filing fee must be paid; another \$8 fee must be paid if the licensee wants to receive an acknowledgement of the filing from the Office.

The role of the Harry Fox Agency. In practice, the statutory mechanical license process is rarely, if ever, utilized. Instead, mechanical rights licenses are granted (at the statutory royalty rate) by the Harry Fox Agency (“HFA”). According to its website (<http://www.nmpa.org/hfa.html>), HFA represents more than 22,000 U.S. music publishers. Songwriters (who are the original copyright owners of the songs they compose) typically assign their copyright interests to publishing companies. The process of applying to HFA for a mechanical license requires a separate application for each song; the information required by the application form includes the name(s) of the publishers who hold an interest in the song for which the license is being sought and the percentage ownership interest held by each publisher. The HFA website indicates that it takes 4-8 weeks for a license to be granted if the application is submitted manually. When a song is released for the first time on CD, the labels and/or publishers don’t always tell HFA; consequently, when an application for a mechanical license is filed for a new song, HFA may have to go back to the publisher for authorization to grant the statutory license.

II. The Problem of Licensing the On-Line Distribution of Music

In 1995, Congress sought to clarify the application of the “mechanical” compulsory license to the on-line distribution of music by amending Section 115 to specify that it covered digital transmission services that make “digital phonorecord deliveries.” Notwithstanding this amendment, the ability of consumers to utilize Internet-based tools to enjoy recorded music continues to be frustrated by legal uncertainty over the scope of the Section 115 compulsory license and by the practical unmanageability of the current Section 115 process in an Internet environment. Furthermore, when it comes to the distribution of music on-line, neither the Harry Fox Agency nor the record labels can be relied upon as a surrogate for the statutory licensing process.

Legal uncertainty. The 1995 amendments to Section 115 provided for the establishment of royalty rates not only for “digital phonorecord deliveries,” but also for “incidental digital phonorecord deliveries” (“IDPDs”). Unfortunately, neither the Copyright Act nor the Copyright Office’s rules define what constitutes an “IDPD.” The music publishers argue that the temporary “buffer” or “RAM” copies typically made on a web-user’s computer in order to receive a “streamed” real-time Internet performance of a song constitute IDPDs for which the transmitting entity must obtain mechanical licenses – separate from the licenses needed to perform the song. Not surprisingly, streaming audio services, including digital locker services such as My.MP3.com disagree.

In addition to legal uncertainty as to what constitutes an IDPD, there is legal uncertainty as to how the Section 115 license is to be applied with respect to IDPDs. The 1995 amendments directed the Copyright Office to conduct a rulemaking to establish such rates and terms; however, upon request of the songwriters and record companies, the Office “deferred” the adoption of IDPDs rates and terms – a decision that remains in effect today. The Office has never explained the meaning of its “deferral” decision. For example, if during the deferral period a transmission service does not file a “notice of

intent” before making IDPDs of a particular song, does the service lose any right to rely on the mechanical compulsory license after the deferral is lifted? Are transmission services immune from liability for IDPDs made during the deferral period or will the rates adopted when the deferral is lifted apply retroactively?

Practical unmanageability. Even if there was no uncertainty as to what constitutes an IDPD or as to the significance of the Copyright Office’s deferral of IDPD rates, the Copyright Act and the Copyright Office’s rules erect insurmountable practical obstacles to the use of the license by Internet-based music providers who are deemed to be making IDPDs. The problem is that an on-line digital locker service such as My.MP3.com, which allows consumers to access streamed performances of their personal music collections on any Internet-enabled device, needs clearance for literally hundreds of thousands of song titles.

- As a prerequisite to obtaining a compulsory mechanical license under Section 115, MP3.com would have to manually search the Copyright Office’s records for the name and address of the copyright owner for hundreds of thousands of song titles (or pay someone to conduct such a search).
- The Copyright Office currently charges \$65.00/hour to search its records (with an estimated time to conduct a search of between 8 and 12 weeks)
- It is likely that, for a substantial number of song titles (totally in the tens, if not hundreds, of thousands), the Copyright Office records will not reveal the name and/or address of the copyright owner. For each of these titles, MP3.com would have to submit to the Office a separately prepared and signed “notice of intent” along with a \$12 filing fee per notice.
- Even where the Office’s records identify the name and address of the copyright owner, it is a virtual certainty that the records for thousands of songs will be out-of-date and that notices sent to the listed address will be returned as undeliverable; in such cases, MP3.com will have to file with the Copyright Office each returned notice, along with evidence of the attempted service.
- And, finally, as for the songs for which accurate addresses can be obtained, MP3.com will have to prepare and serve, via registered or certified mail, separate notices for each title, and will have to submit monthly payments and CPA-certified annual accounting statements for each title.
- In short, compliance with the current Section 115 procedures is not feasible, either practically or economically. And if MP3.com did try to follow the existing procedures, the Copyright Office would end up being buried in an avalanche of paper that it could never process.

Mr. COBLE. We have been joined by the gentleman from Alabama, the gentleman from Florida, the gentleman from Arkansas on the majority side, the distinguished gentleman from Massachusetts, both gentlemen—Mr. Meehan is gone—the gentleman from Florida and the gentlelady from Wisconsin.

Gentleman, we have a vote, as predicted. This will be our final vote of the day. So we will stand in recess to vote, and I urge all Members to return immediately, and we will resume the testimony for Mr. Glaser and Mr. Lovett.

[Recess.]

Mr. COBLE. Ladies and gentlemen, I apologize for the recess, but I can assure you we will not be interrupted by additional whistles and bells from the floor. So we will now direct our attention to Mr. Glaser.

**STATEMENT OF ROB GLASER, CHAIRMAN AND CHIEF
EXECUTIVE OFFICER, REALNETWORKS, INC.**

Mr. GLASER. Thank you, Mr. Chairman, and Members of the Committee. I'm Rob Glaser, founder, Chairman and CEO of RealNetworks. I'm also Chairman and acting CEO of MusicNet, a new company formed by RealNetworks, AOL Time Warner, EMI and Bertelsmann. I also was lucky enough to go to summer camp with Mr. Stoller's son and to high school with his partner, Mr. Leiber. Thank you for inviting me to testify today.

Over the past 6 years, RealNetworks has been a catalyst in the digital distribution of music and video. Indeed, over 200 million people around the world use our RealPlayer and RealJukebox products to listen to and watch audio and video programming on their PCs, and soon through their mobile phones and their game consoles.

The past 6 months have clarified the legal landscape for the on-line distribution of music substantially. The lawsuits by the music publishing and record industries against MP3.com, Napster, and other innovative companies have established that basic copyright law must be applied to the Internet. While the court decisions have not yet resolved important issues regarding personal fair use and specific responsibilities of ISPs to police their services, the basic rules of the road are plainly visible.

Once the courts ruled, it became clear to us that we could build on our core platforms for streaming and downloading to deliver a great new consumer subscription service. And that would be exciting. That's why we formed alliances with AOL Time Warner, BMG, and EMI to create MusicNet. This was the first time a majority of the major record labels have supported such a venture. MusicNet will combine the world's most popular music, a software framework that compensates and preserves the rights of artists and music companies and the ease of use and flexibility that consumers have demonstrated that they want.

A key element of the MusicNet service is that it will require consumers to pay a subscription fee, generally a monthly fee, just like cable TV or a magazine subscription. We believe the consumers will pay a reasonable fee for choice, convenience, and a combination of interactive features. In fact, we've demonstrated that this is true. RealNetworks introduced a media subscription service called Gold Pass about 9 months ago, and we already have over 200,000 paid subscribers, and that's before the general availability of music.

In order to get the greatest possible consumer reach, MusicNet will license its platform to as many retailers and distributors as possible. So far we've announced that both AOL and RealNetworks will be among the initial consumer distributors of the MusicNet platform. Now, if I may, let me show you what MusicNet service will look like. And this, by the way, is the first public demonstration of the MusicNet platform.

What you see here is we've got a PC with MusicNet software on it that's not connected to the Internet. So we've simulated that today, and what I'll first do is I'll just do a basic search, and this will be familiar to many of the folks in the room that I'm sure have used services like Napster. And I'll search for a key word. A common key word in many music products is, of course, the word "love," and we get more than a screen full, as you might imagine, including great songs like The Greatest Love Of All, How Sweet It Is to Be Loved By You, I Will Always Love You, and many, many others.

Let's pick a different way to search. Let's search for artists, and search for one recording artist named Poe who's got a hit climbing up the charts. And what we see here is we've got now songs from Poe's—not only just her new album but her first album as well, both of which are on Warner Atlantic, one of our partners.

And so what I'll do here is I'll pick one of those songs, Hello, which was the title track of her first album, and I'll download it. And so the downloading—again, it's simulated here, but it will just take a few seconds if people have a fast connection. It will take longer if they've got a dial-up connection. We also support streaming of that content which will be much faster, especially for people with modems, and then once the song is available, literally the consumer just clicks on it and plays.

That gives you a sense of that. That demonstration today has looked very similar to what might have—somebody had seen if Napster had been demonstrated or a service like that.

Now I'll show you something that you wouldn't see with the current product like Napster. I'll click on one of the other songs that previously I downloaded so it's been in my library, and instead of—I'll just—I'll hit the play button on that, but something interesting happens: I get a message that says your license to the song has expired. Please press play to renew the license.

The underlying premise here is that consumers license songs when they download them for a particular period of time, probably generally it will be a month, although different license—different affiliates will have different ways of doing that. And then once they have that, then if they want to listen to them again after that initial license period is done, they have to renew the license. Now, it's very easy to renew the license, but what that allows us to do is allows us to track and compensate the rights-holders up all the way the food chain, including both the performing rights-holders and the publishing rights-holders, for the expense of this product. So that gives you kind of just a general overview of what MusicNet is, and I thank you for the opportunity to do that.

Mr. Chairman, MusicNet's upcoming launch underscores the technology is there, the content is being assembled, and the subscription business model is being proven every day. So what's missing? In our view, music publishing issues stand out as the most significant potential impediment to launching great subscription service. Music publishing rights are based on a very simple principle: that the author of the song has the right to be compensated. We are 100 percent in support of this principle.

The issue in front of us relates to how this principle gets applied in the new world of digital distribution. Unfortunately, music pub-

lishing rights is one of the most tangled areas of our copyright system. While some music publishing rights can be efficiently licensed today, others cannot. Simple logic dictates that we set up a licensing system that allows for one-stop shopping and that the license required of all rights for digital distribution can be made available.

To accomplish this, we'll need the cooperation of music publishers who we believe must offer more flexible licenses than they have historically that reflect the function of these new digital distribution services. We hope and trust that there's a strong willingness on the part of all parties involved to work on these simple licensing mechanisms so that together we can launch compelling new music services with the necessary levels of economic and legal certainty.

But, Mr. Chairman, if we're not able to quickly resolve these issues and get these licenses done around the negotiating table, then I believe it will be necessary for Congress and the Copyright Office to step in and streamline music licensing. For instance, Congress has already established compulsory licenses. It could now simply clarify that additional licenses are not required if all a company wants to do is utilize the existing compulsory licenses they have.

Moreover, the Copyright Office has already studied the legal status of ephemeral and temporary copies, and if necessary it could now establish clear rules to facilitate digital distribution.

Ultimately, of course, I hope that the bully pulpit of today's hearing will encourage everyone to sit down and resolve these issues without further legislative or administrative intervention. But I'd urge the Committee to track these issues closely and set a very near-term deadline in which parties need to either report back on progress or expect further action from you all.

Mr. Chairman, I'm confident with the right rules in place, RealNetworks and other companies can create incredible worldwide marketplaces for American companies and creators of content and great products for consumers. I'd welcome the opportunity to continue working with you toward this end. Thank you very much.

Mr. COBLE. Thank you, Mr. Glaser.

[The prepared statement of Mr. Glaser follows:]

PREPARED STATEMENT OF ROB GLASER

My name is Rob Glaser, and I am the founder, chairman and CEO of RealNetworks, Inc. I'm also chairman and acting CEO of MusicNet, a new company formed by RealNetworks, AOL Time Warner, EMI, and Bertelsmann. I greatly appreciate the opportunity to come before you today, because RealNetworks is a leader in Internet media delivery and is a founding member of the Digital Media Association.

Mr. Chairman, you and the other members of this committee are undoubtedly aware that the music industry is at a pivotal point in its evolution, as it confronts issues of great importance to artists, consumers, technology companies, record labels, music publishers, retailers and media companies. The Internet represents a revolutionary opportunity for consumers to experience music in new ways—to personalize the music they hear and to access it from a growing array of convenient devices—and for companies to develop profitable new business models based on these new technologies. If handled properly, this digital music revolution should result in great new experiences for consumers and a bigger economic pie for rightsholders to share.

Over the past six years, RealNetworks has been a catalyst in the digital distribution of music and video. Our RealPlayer technology now enables more than 200 million unique registered users around the world to access a rich variety of audio and

video content that is streamed from computers called 'servers' to the user's personal computer. Our RealJukebox product has made it possible for more than 60 million consumers to download music from the Internet and to manage their personal music collections. And just last month, we announced the formation of MusicNet, a subscription service that will allow consumers to download and stream music, in conjunction with EMI, BMG and AOL Time-Warner. In a few minutes, I will demonstrate the planned MusicNet service publicly for the first time. But before I do, I want to share my perspective on the 'state of play' on digital distribution and the core public policy issues facing the industry.

The past six months have dramatically clarified the legal landscape for the online distribution of music. The lawsuits by the music publishing and record industries against MP3.com, Napster and other innovative companies have established that basic copyright law must be applied to the distribution of music over the Internet. The principle that artists must be paid for the digital distribution of their copyrighted works has been reaffirmed. While the court decisions have not yet resolved important questions regarding personal fair use and the responsibility of ISP's to police their services for questionable content, the basic rules of the road are plainly visible.

Once the courts ruled, it became clear to us that we could build on our core platforms for streaming and downloading of music to deliver a great new consumer subscription service. The goal of this new service, which we decided to call MusicNet, is to combine three essential elements—the popular music that consumers want, a software framework that compensates and preserves the rights of artists and music companies, and the ease of use and flexibility that consumers have demonstrated they want.

A key element of the MusicNet service is that it will require consumers to pay a subscription fee—generally a monthly fee, just like cable TV or a magazine subscription. We believe that consumers will pay a reasonable fee for choice, convenience and a combination of interactive features. Indeed, our own media subscription service, GoldPass, has attained over 200,000 paid subscribers after only eight months—and this early success convinced us that Internet users would subscribe to premium content delivered directly to their personal computers.

In order to implement MusicNet, we decided to forge alliances with the major record labels. Our goal was to license a critical mass of great music for digital distribution, which we believed would catalyze the rest of the industry. On April 2nd, we announced just that. Specifically, we're working with AOL-Time Warner, BMG and EMI who are both licensors to and minority investors in MusicNet. This was the first time a majority of the major record labels have joined such a venture. And since MusicNet is designed to accommodate millions of songs from a wide universe of licensors, our hope is to bring as many labels on as possible; and discussions between MusicNet and other major and independent labels are ongoing.

In order to get the greatest possible consumer reach, MusicNet will not be a retailer itself. Instead, it will license its "private-label" platform to retailers and distributors who will brand, package, and sell it directly to consumers. Our intent is to distribute the MusicNet service through as many partners as possible. To date, we've announced that both AOL and RealNetworks will be among the initial consumer distributors of the MusicNet platform. Additionally, we expect online retailers such as Tower Records to join us, and potentially even including Napster, provided they satisfy legal, copyright and security concerns. Let me give you a taste of what MusicNet's service will look like. This, by the way, is the first public demonstration of the platform:

Mr. Chairman, what MusicNet's launch underscores is that the technology is there, the content is being assembled, and the subscription business model is being proven every day. So what is missing? In our view, music publishing issues stand out as the most significant potential impediment to launching great subscription services.

Music publishing rights are based on a very simple principle—that the author of a song has the right to be compensated. We are in 100% support of this principle. The issue in front of us relates to how this principle gets applied in the new world of digital distribution.

Artists and songwriters have been speaking out about the need to distribute their works to their fans online-and to be paid for that distribution. The presence today of the National Music Publishers Association and acclaimed artist Lyle Lovett underlines the importance of properly compensating songwriters for the digital distribution of their works.

Unfortunately, music publishing rights are one of the most tangled areas of our copyright system. My legal team advises me that up to eight claimed rights arguably are needed to clear a single song to be placed on a computer server and deliv-

ered to a consumer via downloading and streaming. While some of these rights can be efficiently licensed today, others cannot. Simple logic dictates that we set up a licensing system that allows for one-stop shopping and the license of all required rights for digital delivery. To accomplish this, we will need the cooperation of music publishers, who we believe must offer more flexible licenses that reflect the function of these new digital distribution systems.

Songwriters must be compensated when their songs are streamed or digitally downloaded to end users. Yet these licenses should not tax a single delivery of a song multiple times along the chain of delivery across the computer networks that form the Internet. This would be akin to requiring a broadcast royalty toll every time a song is boosted across transmission towers on the way to a consumer's radio. Similarly, these licenses should not tax RAM-buffer copies that exist only for fragments of time in a RealPlayer.

In the end, songwriters will benefit greatly from a simplified licensing regime, because individual songs will be more easily accounted for and transparently tracked; and payment to songwriters for the performance of their works will be rapidly accelerated.

We hope and trust that there is a strong willingness on the part of all parties involved to work out these simpler licensing mechanisms, so that together we can launch compelling new music services with the necessary levels of economic and legal certainty. If the parties involved can establish this framework quickly, I believe a vibrant new market for music will develop.

But Mr. Chairman, if we are not able to quickly resolve these licenses around the negotiating table, then I believe it will be necessary for Congress and the Copyright Office to step in and streamline music licensing. For instance, Congress has already established compulsory licenses; it could now clarify that additional licenses for server copies are not required simply for a company to utilize the existing compulsory license. Moreover, the Copyright Office has already studied the legal status of ephemeral and temporary copies; and if necessary, it could now establish clear rules that facilitate digital distribution.

As you and other policy-makers work to help create a stable and robust marketplace for the distribution of digital content, I suggest that the following fundamental principles guide your efforts:

First, content creators must be fairly compensated for the distribution of their copyrighted works in new markets;

Second, the legal personal-use rights of consumers should not be eroded in the process of ensuring copy protection;

Third, there should be maximum transparency for artists and others whose rights are implicated in the reproduction and distribution of digital versions of audiovisual works;

Fourth, the new distribution channels must be open to fair competition;

Fifth, Congress should eliminate barriers to new methods of digital distribution, such as web radio, that do not exist for traditional media.

Ultimately, of course, I hope that the "bully pulpit" of today's hearing will encourage everyone to sit down and resolve these issues without further legislative or administrative intervention. But I would urge the committee to track these issues closely and set a very near-term deadline by which the parties need to report back on progress. If an agreement is not reached quickly, it may well be appropriate for Congress or the Copyright office to step in directly—guided by the principles I have just laid out.

Mr. Chairman, RealNetworks embarked on a journey six years ago—a journey to bring digital music and content to consumers everywhere—and we are excited that with the launch of MusicNet and other recent developments, that vision is coming more fully into fruition. I am confident that with the right rules in place, we can create incredible worldwide marketplaces for American companies and creators of content. I welcome the opportunity to continue working with you toward this end.

I'd be happy to answer any questions you might have.

Mr. COBLE. Mr. Lovett.

STATEMENT OF LYLE LOVETT, AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

Mr. LOVETT. Thank you, Chairman Coble, Members of the Subcommittee. My name is Lyle Lovett, and I'm proud to be both a

songwriter and a performing artist. I'm also proud to say that I am here today on behalf of over 117,000 songwriter and copyright owner/members of ASCAP, the American Society of Composers, Authors and Publishers.

I appreciate the opportunity to present our views to the Subcommittee, and thank Chairman Coble, Ranking Member Berman, Vice Chairman Goodlatte, and the entire Subcommittee for their support of intellectual property rights in the United States and throughout the world.

We at ASCAP know that important legislation like copyright term extension and the Digital Millennium Copyright Act became law largely through your efforts, and for that I express the deep gratitude of all of ASCAP's members.

I'm a songwriter, not an economist. But I can tell you from first-hand experience how valuable the songs, the intellectual property that my fellow songwriters and I create, are to the American economy. We are proud of the positive impact our creative work has for so many people. The artists and musicians who perform our songs, the technicians who work to record them, the retailers, both traditional and online, who legally sell them, the folks who work our concert tours, those in theatres and arenas employed when we appear, the workers who manufacture instruments and electronic equipment. This chain of economic benefits is enormous, and it all begins with our songs.

In addition to the economics, songs provide enjoyment. In fact, when you consider how much of the usage of the Internet is related to people's desires to enjoy music by listening or downloading, it would be fair to say that our efforts are one of the main reasons for the growth of the Internet. The Internet without music would be like radio without music, just imagine that.

Mr. Chairman, it is also true that copyright is one of the few bright spots in America's balance of trade. Given the far greater popularity of American musical works overseas compared to the performance of foreign works in the United States, ASCAP was able to collect about four times the amount of royalties from abroad as it paid out last year.

Just think if we had that kind of surplus in manufactured goods. But what it also tells you is the extent to which American copyrighted intellectual property is serving as an ambassador to our way of life to the rest of the world, and I think it is safe to say that in any village or town or city in virtually any place on Earth, you will hear American songs. Our music is the new lingua franca of international culture.

Mr. Chairman, I would like to offer a performing songwriter's perspective on technology. There isn't a songwriter I know who opposes new technological ways to perform music. Technology always has been the friend of the songwriter. From piano rolls, to phonographs, to radios developed from early crystal sets, to what we hear and enjoy today, through television in its various incarnations and now the Internet, we have looked upon each of these revolutions in communications as new ways to enjoy our music and new ways for us to earn a living by doing what we love, which is a tremendous privilege to everybody, a living by doing something you love.

And as long as we are being compensated fairly for that listening pleasure, we are able to feed our families, pay our bills and sustain careers as songwriters. The songs I create mean many things to me. Foremost, the goal of every artist is to connect with and to communicate his or her thoughts, emotions and beliefs to his or her audience.

My songs, therefore, are truly my creations, extensions of who I am and what I believe. But my songs also are my livelihood. If I can't earn a living from them and if every songwriter is unable to earn a living from creating music, who then will write the songs of America and the world?

I love what I do, but this is a tough business. And to illustrate that, I would ask each of you on this distinguished Committee to think about this question: Have you ever seen in the classified section of any newspaper an ad which reads: Songwriter wanted, good salary, paid vacations, health benefits and many other perspectives? I'm sure you haven't.

Most songwriters are entrepreneurs, trying again and again for that hit which will help keep them writing in the hopes of another hit, so that songwriting can be more than a part-time unpaid struggle.

I have no objection to songwriters or performers agreeing that their work be free on the Internet or anywhere else if they want. Some have made that choice. But for me and for the overwhelming majority of my songwriter and performer colleagues, our choice is that we be compensated for the use of our creative work which is our property.

Mr. Chairman, there are two aspects to ASCAP's licensing of musical performances on the Internet which I think will be of great interest to the Committee.

First, ASCAP has never turned down an Internet user who requested a license, nor has ASCAP sued any Internet user in an attempt to shut down the Web site rather than to license it.

Second, through the mechanism of the ASCAP license, every licensed Internet user has the right to perform all the many millions of works in the ASCAP property. ASCAP is an Internet licensing success story. Its Web site licenses have grown exponentially from a mere 150 sites in 1996 to the 2,200 Web sites ASCAP licenses today.

In fact, there is no need for Internet users to worry about whether they may operate lawfully if they perform ASCAP music or to wonder when a usable licensing mechanism will come about. It has been here, it is here, and thousands of Web sites are using it.

Mr. Chairman, there are some who believe a compulsory license is the answer to the current controversies regarding usage of copyrighted works on the Internet. Those arguing for a compulsory license have given some supposed justifications for this sort of interference in the free marketplace. They said it was justified because they couldn't engage in individual negotiations with copyright owners, but ASCAP's license means that the entire repertoire of music, millions and millions of compositions written and owned by 117,000 members, is licensed in one transaction. They said that it was justified because no workable licensing mechanism exists, but ASCAP has successfully licensed thousands of Internet users. They said it

was justified because copyright owners refused to license them, but ASCAP will license any user who wants a license.

Mr. Chairman, there is no justification for a compulsory license. Compulsory licensing, which is another way of saying government price setting, should be repugnant to those who believe in a free market and the sanctity of private property, which includes intellectual property.

Mr. Chairman and distinguished Committee Members, the entire world wants and enjoys America's music. The decisions you and your colleagues make about protecting copyright may well determine whether that continues to be the case.

A compulsory license would be a blow aimed at the ability of those who create America's music to continue to flourish. I am honored to have been able to appear before you. On behalf of my 117,000 ASCAP colleagues, I thank you for this opportunity to present our views. Thank you very much.

Mr. COBLE. Thank you, Mr. Lovett.

[The prepared statement of Mr. Lovett follows:]

PREPARED STATEMENT OF LYLE LOVETT

Mr. Chairman and members of the Subcommittee, my name is Lyle Lovett, and I am a songwriter and performing artist. I am proud to say that I am here today on behalf of over 117,000 songwriter and copyright owner members of ASCAP, the American Society of Composers, Authors and Publishers. I appreciate the opportunity to present our views to the Subcommittee, and thank Chairman Coble, Ranking Member Berman, Vice-Chairman Goodlatte, and the entire Subcommittee for their support of intellectual property rights in the United States and throughout the world. We at ASCAP know that important legislation like copyright term extension and the Digital Millennium Copyright Act became law largely through your efforts, and for that I express the deep gratitude of all ASCAP's members.

ABOUT ASCAP

ASCAP is an unincorporated membership association of composers, lyricists, songwriters and music publishers. It is governed by a board of Directors consisting of 12 writers and 12 publishers, elected by the writer and publisher members respectively. The Board is responsible for setting policy. ASCAP licenses only the right of nondramatic public performance of its members' copyrighted musical compositions, through the mechanism of licenses which give users the right to perform any and all of the many millions of musical works in the ASCAP repertory.

The ASCAP royalty distribution system is a model of fairness to all parties. Through their membership in ASCAP, songwriters and music publishers divide all royalties 50-50. The writer's share is paid to the writer, and the publisher's share to the publishers.

THE IMPORTANCE OF MUSIC TO THE UNITED STATES ECONOMY

I'm a songwriter, not an economist. But I can tell you from first-hand experience how valuable the songs—the intellectual property my fellow songwriters and I create—are to the American economy. Beside the economic value in the song itself, we are proud of the positive impact our creative work has for so many people: the artists and musicians who perform our songs, the technicians who work to record them, the retailers, both traditional and on-line who legally sell them, the folks who work our concert tours, those in theaters and arenas employed when we appear, the workers who manufacture instruments and electronic equipment. Mr. Chairman and distinguished committee Members, this chain of economic benefits is enormous, and this chain all begins with our songs.

In addition to the economics songs also provide a whole lot of enjoyment. In fact, when you consider how much of the usage of the Internet is related to people's desires to enjoy music by listening or downloading, it would be fair to say that our efforts are one of the main reasons for the growth of the Internet. The Internet without music would be like radio without music: quite empty except perhaps for weather reports, business news, and other non-entertainment information.

Mr. Chairman, it also is true that copyright is one of the few bright spots in America's balance of trade. Music, and in particular the performing rights in our music which ASCAP licenses, are an important element of that intellectual property trade surplus. Given the far greater popularity of American musical works overseas compared to the performance of foreign works in the United States, ASCAP was able to collect about four times the amount of royalties from abroad as it pays out. That tells you a whole lot about the value of copyrighted intellectual property to the American economy. Just think if we had that kind of surplus in manufactured goods! But what it also tells you is the extent to which American copyrighted intellectual property is serving as an Ambassador for our way of life to the rest of the world. I have traveled abroad as I know many of you have. And I think it is safe to say that in any village or town or city in virtually any place on the globe you will hear American songs. Our music is virtually the new *lingua franca* of international culture. I think we should all want to keep it that way.

A SONGWRITER'S PERSPECTIVE

Mr. Chairman, not only am I not an economist, but I also am not a lawyer, so I cannot explain the legal details of Internet uses of music. But I can give you a songwriter's perspective on a few things.

First, let me say as clearly as I can that there isn't a songwriter I know who opposes new technological ways to perform music. Technology always has been the friend of the songwriter: from piano rolls, to phonographs, to radio's development from early crystal sets to what we hear and enjoy today, through television in its various incarnations, and now to the Internet, we have looked upon each of these revolutions in communications as new ways to enjoy our music; and, new ways for us to earn a living by doing what we love—creating America's music. Every new way to bring performances to the public is a new way to bring them enjoyment. And as long as we are being compensated fairly for that listening pleasure, we are better able to feed our families, pay our bills, and sustain careers as songwriters.

The Internet has broadened the enjoyment of our music to include the far corners of the world. We love that; and we must all remember that Internet usage is traceable far more to people enjoying our songs than it is to scholars researching on the web sites of distant museums, or investors following stock quotes. Insuring that our music remains popular and profitable is another way to insure the growth of the Internet.

From ASCAP's point of view, another reason for its support of the new technology is its positive impact on reducing our costs. Globalization of the music business has led to ASCAP taking the lead in forming a joint venture with our sister societies in the United Kingdom, the Netherlands and Canada to reduce our back office expenses. We expect this joint venture to expand, and it has been made possible by the revolution in communications.

The songs I create mean many things to me. Foremost among them is my goal, and I think the goal of every artist, to connect with and communicate my thoughts, emotions and beliefs to my audience. My songs therefore are truly *my* creations—extensions of who I am and what I believe. But, my songs also are my livelihood. If I can't earn a living from them, I'll have to do something else. And if every songwriter is unable to earn a living from creating music, if every songwriter has to do something else to make ends meet, who will write the songs of America and the world? I love what I do. But this is a tough business. And to illustrate that, I would ask each of you on this distinguished committee to think about this question: Have you ever seen in the classified section of any newspaper an ad which reads: "Songwriter wanted. Good salary. Paid vacation. Health benefits and many other perks." I'm sure you haven't. Most songwriters are lonely entrepreneurs trying again and again for that hit which will help them take care of their families and keep them writing in the hopes of another hit down the road so that songwriting can be a career, not a part-time unpaid struggle. In my case, it took many years and many songs before I had that first hit. However, success would be meaningless without strong copyright laws and a vigorous and vigilant ASCAP. For it is only through the protection of the copyright law, and through ASCAP and similar groups, that our right to earn a living from our creative work is assured.

Please let me be clear: I have no objection to songwriters or performers agreeing that their work be free on the Internet or anywhere else if they want. Some have made that choice. But for me, and for the overwhelming majority of my songwriter and performer colleagues, our choice is that we be compensated for the use of our creative work, which is our property.

Now let me make just a few points based on my understanding of ASCAP's approach to Internet uses of music.

ASCAP'S LICENSING OF INTERNET PERFORMANCES OF MUSIC

There are two aspects to ASCAP's licensing of musical performances on the Internet which I think will be of great interest to you.

1. ASCAP has licensed every Internet user who has requested a license to perform ASCAP music. ASCAP has never turned down an Internet user who requested a license and was willing to pay a reasonable license fee. ASCAP has not sued any Internet user in an attempt to shut the website down rather than license it. And, through the mechanism of the ASCAP license, every licensed Internet user has the right to perform all the many millions of works in the ASCAP repertory. If, there are any difficulties that Internet users have in licensing works piece-by-piece, those difficulties are solved by an ASCAP license.
2. ASCAP is an Internet licensing success story, right now. There has been much discussion about when various licensing systems would be put into place. ASCAP's is already in place, and has been since 1995. I am told that ASCAP currently has about 2200 websites licensed to perform music. Year-by-year, the approximate number of Internet websites licensed is:

<u>Year</u>	<u>Websites licensed</u>
1996	150
1997	300
206,525	
207,1,200	
208,2,000	

Indeed, ASCAP tells me that, of the 66 members of DiMA, ASCAP has licensed 28, and is in negotiations with another 17.

Therefore, there is no need for Internet users to worry about whether they may operate lawfully if they perform ASCAP music, or to wonder when a usable licensing mechanism will come about. It has been here, it is here, and thousands of websites are using it.

THERE IS NO NEED OR JUSTIFICATION FOR A COMPULSORY LICENSE

There are a few conclusions from these facts which go to the heart of several issues of interest to the Subcommittee:

There is no justification for a compulsory license for Internet uses of ASCAP music. Those arguing for a compulsory license have given some supposed justifications for this sort of interference in the free marketplace. They said that it was justified because, for whatever claimed reason, they couldn't engage in individual negotiations with copyright owners. But ASCAP's license means that the entire repertory of music—millions and millions of compositions written and owned by 117,000 members—is licensed in one transaction. They said that it was justified because no workable licensing mechanism exists. But ASCAP has successfully licensed thousands of Internet users since 1996. They said that it was justified because copyright owners refused to license them. But ASCAP will license any user who wants a license, at a reasonable fee, and the user will be licensed simply by virtue of requesting a license. Compulsory licenses should be repugnant to those who believe in the free market and the sanctity of private property, including intellectual property. The undisputed facts of ASCAP's Internet licensing demonstrate that a compulsory license is not justified.

Mr. Chairman and distinguished committee Members, the entire world wants and enjoys America's music. The decisions you and your colleagues make about protecting copyright may well determine whether that continues to be the case. A compulsory license would be a blow aimed at the ability of those who create America's music to continue to flourish.

I am honored to have been able to appear before you, on behalf of my 117,000 ASCAP colleagues, and thank you for this opportunity to present our views.

Mr. COBLE. Before I start my questioning, I want to make a comment or two. I was talking to one of my constituents, Mr. Lovett, 4 or 5 weeks ago. You said something that triggered that memory. He was talking about a job that he had had for 10 or 12 years and his wife wanted him to change jobs. And I asked him if he regret-

ted they left the first job. And he said to me, with his voice generously laced with emotion, he said, It was the only time in my life that I had a job at which I was good and I loved it.

And you said yourself, people who earn their living by doing what they love to do are indeed fortunate people.

Someone asked me if I could describe the purpose of today's hearing in one word. I thought for a moment. I said, well, that can be done with several words. "compensation" hits me between the eyes, and "marketplace-driven economy." I think when people produce a product or deliver a service, they expect to be paid for it and they should be paid for it. I don't think that writers and publishers and composers and performers and artists ought to be exempt from this. I think they should be paid for it as well, because you folks contribute very significantly to the well-being of our society. And I thank you for it.

Now you can start the clock on me. We have the red light that applies to us, too, folks.

Mr. Bronfman, in your testimony, you mentioned that Vivendi and Universal is in the process of finalizing other licensing deals. Would any of these deals be with any third-party distributors?

Mr. BRONFMAN. Chairman Coble, the licenses to which I refer in my testimony are with third-party distributors, not with affiliated companies, and we expect to continue to license our music to other third-party affiliates as well. As I mentioned, it's most important to us that our music be broadly and widely available on a global basis to as many consumers as possible, with any online service that can demonstrate a secure system and the ability to properly compensate the property holders.

Mr. COBLE. Mr. Stoller, do you believe that all Internet streaming transmissions require a mechanical license?

Mr. STOLLER. I believe that under the copyright law, anything that requires a copy or that makes a copy of our work should be under the control of the creator and his or her protector, so to speak, in the form of a music publisher. And it is my understanding that this involves copying. I'm certain that it is a subject for negotiation.

Mr. COBLE. I didn't hear the last thing you said.

Mr. STOLLER. I said I'm certain this is one subject for negotiation.

Mr. COBLE. Oh. Thank you, sir.

Mr. Richards, are Webcasters currently paying royalties for RAM, random access memory, copies of musical works created during digital transmission?

Mr. RICHARDS. I can't be certain what all other companies are doing, but we are. We pay royalties whenever there's a transmission. We pay multiple royalties, in fact five different sets of royalties, as I showed earlier, three of which are to the publishers today, and two of which are to the record companies today.

We deal with music that people already have purchased, and they're trying to put it into a secure locker to play it back to themselves. So theoretically they bought a copy, we bought a copy, so that we can make sure that that copy was the same copy. We pay ASCAP, as we have—ASCAP, by the way, I agree with Mr. Lovett. ASCAP's system has been working fine for us. And we paid four

other license fees for the various copies that occur as a result of the incident of technology for a consumer to listen to their own music.

Mr. COBLE. Mr. Glaser, DIVA argues that RAM and buffer copies are valueless copies and should be exempt from the scope of the copyright owners' exclusive rights. However, music publishers and songwriters point out that it's possible for consumers to access these temporary copies, convert them into MP3 files and download them to their computer for free with a software product such as Total Recorder.

What say ye to that?

Mr. GLASER. Well, I think that we have a lot of very good secure systems for protecting the interest of copyright. In fact, going back 6 years to the first RealAudio product, we've always allowed rights-holders to characterize their intention in terms of the copying of their songs, and we successfully sued under the DMCA in the first case against a company called StreamBox that attempted to circumvent that activity. So we are strong protectors of intellectual property rights in our systems, both technologically and, more necessarily, legally.

The particular issue you described, as I understand it, is that there are cases where there are transient or ephemeral copies of pieces of material made along the way to transfer something. That's just like when you have music going over from one transmission tower to another, there might be—the signals might get boosted or propagated, and we don't consider that a copy. We consider it part of the broadcasting process. And that—I think it would be a very dangerous precedent to start differentiating between different technical methods of broadcasting, as long as they all—they in fact do offer the rights-holders the intended protections, and ours certainly do.

Mr. COBLE. Well, the ominous red light illuminates. I have two questions I want to put to Mr. Lovett, but I'll do that after we make our rounds.

Mr. Berman.

Mr. BERMAN. Thank you, Mr. Chairman. On the theory that two times isn't enough and why not do it three times, Mr. Boucher asked the question of you, Mr. Bronfman—your testimony responded to it. The Chairman asked you. But I think it's very important to establish this point. You're appropriately getting, I think, a lot of accolades for knocking down this belief that many had a while ago that the recording industry—the record companies do not want to put their music online. Your company and the other ones also are making major investments in ventures into online music, but several issues are raised. One is, is this going to end up as some kind of monopoly control, where companies you own and partner with are the only ones who will be able to do this? And the second one is for those artists who want to find alternative avenues for distribution, will they be blocked somehow from ever getting access to the consumer?

I'm curious, one more time, if you could just address that issue.

Mr. BRONFMAN. Congressman, I think, just to step back for a minute, I think two things are important to remember here. We really are at Day One in the life of the Internet as a distribution

channel for the distribution of intellectual property, and it's difficult to say exactly how it will play out and what the economic models will or won't be. Certainly the economic models that we believed existed 2 years ago no longer exist today for the Internet.

I think it's also important to point out—even though I found much of Mr. Stoller's testimony to be at the least misleading and in that sense disappointing—particularly one of the things I would say is that music companies have not been reluctant to license their music to the Internet. Quite to the contrary. We've been reluctant to do so in the absence of a technology which could protect the rights-holders, and it has been the time that it has taken in a very complex technological world to create technologies, which is at the dawn of arriving.

And Rob has been, in RealNetworks, a great proponent. Thank you, Rob, for your steadfast support of rights-holders as you've built a secure system. And Duet will go out with its own secure system. And it has really been the building of those that has delayed the advent of music on the Internet, not a reluctance to license.

Mr. BERMAN. This is to Rob, not to Robin.

Mr. BRONFMAN. This is to Rob, yes, not to Robin. But I would also say that as far as Universal is concerned, we intend to license our music broadly. We intend to license it to third-party distributors. We intend to license it as broadly and as widely as we can. We—it is not our intention to license only to ourselves or to create a polygopoly or some kind of oligopoly of online distribution. Nor do we want to see that created by others.

We want to see music where music is ubiquitous, where our music is ubiquitous wherever music is found and where consumers can find it easily, reasonably, in a secure fashion. And we want to propagate that kind of business model. And it is to that end that we intend to be licensing as broadly as possible, again with the criteria that there be a secure system to protect our copyrights and the ability to compensate our rights-holders.

Mr. BERMAN. Mr. Glaser, you testified that you believe it's appropriate for Congress to step in and streamline music licensing. Either in this round or the next round, I want to get to that. But there is a sort of irony here. RealNetworks has, as I understand it, at least 10 patents, one for audio on-demand communication system—I think RealPlayer, which is the most widely used media player on the Internet. It is based on a patent for a Universal compressed audiomaker.

What would be your reaction if Congress came in and sort of mandated licensing of your developments so that other companies can now manufacture and distribute the items that you've patented through your creativity and ingenuity?

Mr. GLASER. Well, I think my personal view is that the entire patent software system needs to be overhauled. That's probably a set of views that go beyond the scope of today's hearings. We have a set of patents for some very innovative technology we've created, and we tend to use those patents pretty much as a shield so that bigger—other bigger companies won't engage us in patent fights, rather than initiating patent fights ourselves.

Mr. BERMAN. I guess I would have liked you to have raised your hands and conceded, which you don't seem to be willing to, is that in other words you have something of value that's protected, and you want to be able to negotiate who's going to manufacture RealPlayer and who's going to use your technology and who you're going to license to and for what price you're going to license. And I think there is an underlying philosophy there that I think is legitimate and.

Mr. GLASER. We absolutely support the interest of rights-holders to not only get compensated for their works but to have the ability to determine sort of the economics of that. The issue here is simply making sure that the fact that the music publishing industry is not organized in a way that lends itself to these broad-based kinds of subscription services doesn't create chaos so we're not able to move forward. Certainly we'd love nothing more than to have all these issues resolved through business-to-business negotiation, just as we've done in setting up MusicNet itself.

My comments were meant to say that in the event that that process breaks down or doesn't converge in a fairly rapid time frame, I think the only thing to do, if we actually want to have a rational marketplace, is to have either the Copyright Office or Congress clarify existing sets of rules that have allowed previous kinds of distribution systems to flourish.

Mr. COBLE. The gentleman from Utah, Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman. Gentlemen, I appreciate your attendance today. This is a difficult and complex issue, and I have several questions, so I'd appreciate it if we could have relatively short answers. And I'll try and frame my questions such that they are deserving of short answers.

Mr. Bronfman, if I could start with you first. Can you tell me how many licenses of the whole Universal catalog, song catalog, have been granted to online music distributors, not counting those companies either involved in litigation or with you or affiliated with your corporation?

Mr. BRONFMAN. I don't think I have an accurate answer for you, Congressman, off the top of my head; but it would be somewhere, I think, more than a dozen, and probably less than 20. But I can get you an accurate number.

Mr. CANNON. That's songs, not companies. What is the total number of songs out of your catalog or percentage—

Mr. BRONFMAN. Oh, excuse me.

Mr. CANNON [continuing]. Of your catalog?

Mr. BRONFMAN. I honestly don't know the answer to that, Congressman. I'd have to come back to you on that.

[The information referred to follows:]

EDGAR BRONFMAN, JR., ANSWER TO REPRESENTATIVE CHRIS CANNON

I am advised that when the Universal Music Group licenses its catalog to an on-line service, including companies such as MP3.com, MTV/RadioSonicnet, ClickRadio, Musicbank, Ecast, Touchtunes, and eGreetings, we license the entire catalog. That includes all of our collection of Motown hits, the Elton John and Jimmy Buffett songs within our catalog, everything within our extraordinary jazz catalog and the classics from Deutsche Grammophone. Everything from ABBA and Andre Boccelli to country artists like Shania Twain and George Strait.

Universal Music Group has also provided catalog licenses for audio clips to companies such as MusicMusicMusic, Discover Music and Loudeye for sampling services.

Both Discover Music and Loudeye were given the ability to sub license the catalog of Universal audio clips in order to provide Business to Business sampling services to online retailers such as Amazon, CDNow, barnesandnobles.com, and many others. Discover Music was recently acquired by Loudeye and the combined company currently offers Universal content to dozens of its customers as a part of its music services.

Additionally, we have licensed only portions of our catalog to other sites, at the request of the site. For example, many sites are genre-specific and only need a subsection of the catalog such as Universal's comedy or jazz albums. As I stated earlier, we want to make our music broadly and widely available on a global basis to as many customers as possible, with any online service that we can demonstrate a secure system and the ability to properly compensate the copyright holders and creators of the music.

Mr. CANNON. It would be fine if you could make that available to the Committee, I'd appreciate that. The reason I asked the question is that a lot of online music companies have talked about this issue, and they all say the same thing: The labels refuse to give us enough content.

How do you respond to their allegation that the labels are dragging their feet so that Duet and MusicNet can establish themselves?

Mr. BRONFMAN. Well, first of all, I would say that I think that—as I said, we are Day One of the Internet. I think that the Committee ought to see how this plays out and see—and see whether or not it's—the fear that you suggest that somehow MusicNet and Duet are going to control the market actually appears to be the case, in which case the Committee can react. I don't think that is going to be the case.

In fact, what I think most of these companies who complain lack is the—are the kinds of systems that are necessary in order for us to grant a complete license. The kinds of security systems and the technology that's related to them and to the proper compensation is a very complex thing. There are many companies that will sit and tell you they have them. I'm here to tell you they don't, and until they—.

Mr. CANNON. May I just ask another question? My understanding is that Duet has yet to secure the necessary licenses from the music publishers. We've heard a little bit about that already, and the Vivendi and RIAA support applying the compulsory mechanical license to online music to circumvent this problem.

Doesn't it seem rather hypocritical that you're seeking to use a compulsory license on the one hand, but you vigorously object to any mention of compulsory licenses for companies like Napster, Listen.com, MP3—or MP3 to market your products?

Mr. BRONFMAN. Congressman Cannon, it is difficult to respond to a question like that, which has as its very premise such a fundamental inaccuracy. If I can—if I can be straightforward with you to say that the sound recording industry is an industry which has been based for its entire history on the—its ability to exclusively contract with artists for their songs; whereas, the music publishing industry has been an industry which has been based for its entire life and time on a compulsory license, almost 100 years. And in fact, at the behest of the music publishers, that compulsory license was extended in 1995 to include digital distribution. It's therefore impossible to try and consider the two industries as the same kind of industry.

Mr. CANNON. I don't think that that was actually the presumption. They're not the same. We understand, I think most on the Committee, the historical differences.

Mr. BRONFMAN. But we have not sought, sir, a compulsory license for sound recordings, nor have we sought to extend the compulsory license for musical publishing. What we have sought to do is have the Copyright Office clarify the rate at which we should be paying the music publishers, because we believe that the mechanical licenses that we have, the Congress has granted us the license to bring those songs online.

Mr. CANNON. Thank you very much, Mr. Bronfman. I appreciate that.

Mr. Glaser, would you support a provision similar to that in the Digital Performance Right and Sound Recordings Act that would require recording companies to provide licenses to competitors on the same terms and conditions as they do to affiliated companies? And just before you answer that, let me raise one other point, because I think my time will disappear with this questioning round.

Mr. Glaser, Real Web sites include links to quite a large number of pornography sites, including something called BarelyLegal.com and another called TeenFilt. Mr. Glaser, I am more than a little disappointed that you're making money off a site called TeenFilt. But the question is, do you plan on any joint activities between MusicNet and your pornography copromotion deals? So those are the two questions. Thank you.

Mr. GLASER. Well, the first question, the answer is yes in terms of compulsory licensing. From the standpoint of—our view is that major music companies should certainly provide the same kinds of licenses that they did to MusicNet. And MusicNet is a company that RealNetworks is one shareholder and music companies are shareholders in, but it's a new-banded company, and four of the seven board seats are held by other than music companies. So whether it passes your test as being an arm's-length transaction or not, those were the ways we negotiated those.

And the second part of your question, I must honestly say that I don't know what you're referring to at all, so I would need to get back to you on that.

Mr. CANNON. Pardon me. You're not aware of the pornography sites that you can get to from Real.com?

Mr. GLASER. I'm certainly aware that the nature of the Internet is that you can link from anything to anything, but—.

Mr. CANNON. No. These are on Real.com.

Mr. GLASER. I do not believe that's correct, but I will certainly be happy to—.

Mr. CANNON. I will tell you the path you go—well, I don't know if I want to tell the world the path. But you just click on your sites, and it is part of your—I would appreciate it if you would look at that and let us know. But I take it your intent would not—would be—if you're distancing yourself from those sites, that you would try and—.

Mr. GLASER. That's correct.

Mr. CANNON [continuing]. Keep yourself separate from kids who are looking for music—.

Mr. GLASER. Absolutely correct.

Mr. CANNON. Thank you.

Mr. COBLE. I thank the gentleman. Folks, I think that this is important enough that we probably will have a second round of questions.

The Chair recognizes the gentleman from Virginia for 5 minutes.

Mr. BOUCHER. Well, thank you very much, Mr. Chairman. I want to compliment all of these witnesses on their superb testimony here this afternoon. You have enlightened us, and we appreciate the time you've spent in preparing and presenting your statements today.

Mr. BRONFMAN. I would like to return with you for a moment to the business plan that Duet is preparing and get your sense of what level of service is going to be made available under Duet, to Duet's customers. I personally think that what the Internet-using public wants is the opportunity to download, on a permanent basis, to the hard drive a single track and to pay a fee, which is reasonable, for that privilege.

And my simple question to you is: Will Duet offer that service, the ability to download on a permanent basis a single track from your site in exchange for the payment of a fee?

Mr. BRONFMAN. Congressman, I think the—your suppositions of what the consumer wants and our suppositions of what the consumer wants are interesting. They are—they are—no doubt probably yours may be more accurate even than ours, but it's only the marketplace that will ultimately tell us what consumers want, what they're willing to pay for, and therefore what we need to offer. Initially I believe the MusicNet service and the Duet service will be quite similar, in that they will be offering streams and what we're calling tether downloads. I'm not sure—.

Mr. BOUCHER. Would you like to define what a tether download is?

Mr. BRONFMAN. Well, it simply—it simply—it simply means that the consumer does not have the ability to take that song off of the computer to portable devices at this time. But I think—.

Mr. BOUCHER. Will the music reside on the computer permanently?

Mr. BRONFMAN. Well, it depends on the conditions on the download. It's very—.

Mr. BOUCHER. Well, the word "tether" just seems to suggest that you're going to pull it back at some point or that it's going to evaporate and that it will not be a permanent download.

Well, I know the technology exists that allows the download to be temporary in nature, and my simple question is: Do you intend for the customer to have access to a permanent download, or will it be in fact a download of a temporary variety?

Mr. BRONFMAN. Well, again, I think that is in the nature of the consumer offer. If the consumer is buying a 30-day subscription and paying for a 30-day subscription, the price of that subscription will limit their ownership for 30 days. There may be—.

Mr. BOUCHER. But there will be a permanent version.

Mr. BRONFMAN. There no doubt would be a permanent version if there is a call for a permanent version.

Mr. BOUCHER. I think I have your answer, which is you don't have an immediate plan to offer the permanent version.

Let me suggest to you that not only would the permanent version dramatically expand the market for your music, I think you would find your sales soaring if you harness the power of the Internet and make that available. But in my humble opinion, that is your best defense to Napster-like peer-to-peer file sharing services.

The new version of file sharing services, unlike Napster, have no central servers. There is no company to sue. The industry has been effective in addressing its concern with regard to Napster by going to court, and you had the convenient mechanism of a company to sue. That will not be the case with the next generation of peer-to-peer file sharing services.

And let me just suggest to you in the little time I have here, that I think your best defense to that new generation of peer-to-peer technology is to make available over your site, for a reasonable fee, for a permanent download individual tracks.

I'm going to pass on and give Mr. Richards an opportunity to comment on what I know is an important matter to him, and that is the need to have a mechanism to license incidental copies in a way that can permit your business model to come into existence and start serving customers in a very broad way.

You've heard Mr. Stoller talk about the fact that the license debate is not about the ability to get a license, but about how much the license costs. And I think you have an example of where the debate really is about the ability to get the license. And would you care to emphasize to this Committee the factual situation that gives rise to that concern and suggest why the Copyright Office needs to put in place a temporary safe harbor arrangement that enables the assured licensing of the mechanical rights that you need to get?

Mr. RICHARDS. Yes. Thank you, Congressman. It is absolute and without question that nobody at this table will any time soon have any of their locker services up and running and available to consumers, if the publishing question—and what do I mean by “the publishing question?” 115 exists today. We're not asking for a new law. It's the difficulty in accessing that law that, on the one hand and on the other hand, in trying to negotiate with publishers—and I'm certainly a free market person. We've made probably more deals with more record companies and more publishers than anybody, but the fact of the matter is the Harry Fox Agency only represents 70 percent of all of the publishers in America. I think they claim about 25- or 30,000 publishers.

That leaves 6-, 7-, 8,000 publishers to find, to negotiate with, to come to resolution with. And I—I think this is virtually impossible. And I think since you need both a master recording and a publishing license today, that if we do not create a safe harbor under 115, you will not see locker services for consumers.

Mr. BOUCHER. So your point is that it's virtually impossible to identify the owners of the various rights so as to have a discussion with them about the terms under which they would license those rights to you?

Mr. RICHARDS. That's correct. I don't even know where to go about it; 6-, 7,000 folks to go find them, where do they live, bring them in my office, try and negotiate with them. I don't—I don't even know how to do it.

Mr. BOUCHER. And would you describe just briefly the kind of temporary safe harbor arrangement that you would like for the Copyright Office to put into effect that would enable you to get those license rights cleared?

Mr. COBLE. Mr. Richards, if you'll suspend. The gentleman's time has expired. Can you do this quickly? If not, we'll take it to the second round. Can you do this quickly?

Mr. RICHARDS. I'll do it in a very—we'll take a lesson from the cable industry and satellite industry. We'll create a safe harbor. Those of us that can track—as Mr. Bronfman talked about, those of us who can track the plays will track them, keep them in order, wait for the claimants to come as the rates and different things are set in 115, and we'll get this show on the road with regard to digital music available to consumers.

Mr. BOUCHER. Thank you, Mr. Richards. Thank you, Mr. Chairman.

Mr. COBLE. The gentleman's time has expired. The gentleman from Alabama is recognized for 5 minutes.

Mr. BACHUS. Mr. Richards, you talked about the need to update section 115. Is that right?

Mr. RICHARDS. I talked—I talked about the need to have 115 function as the lawmakers intended it to function.

Mr. BACHUS. Which would require update—

Mr. RICHARDS. It's part of a rulemaking thing. The Copyright Office has a—really can't take all of the—all of the volume that a digital company is required—or needs to create an online locker service. And the rules that are necessary for us to give the data that the Copyright Office needs for us to apply for a license to get a publisher to, you know, allow for 115 to work for us require us to know who that publisher is, require us to put down the address of that publisher, require us to put down the songs of that publisher.

There's no possible way that—without dealing with one body like a Harry Fox, and that is even difficult at times—but there's no possible way that we can go out to 6- or 7- or 8,000 other unknown publishers to create an online system, and that's why a safe harbor under 115—

Mr. BACHUS. Well, that would—

Mr. RICHARDS [continuing]. Would work.

Mr. BACHUS [continuing]. Require a change of the law, wouldn't it?

Mr. RICHARDS. My understanding is that the law exists under 115, that it is compulsory. A rate has not been set, and a safe harbor under that—I'm not sure if that changes the law or if it facilitates the actual intent of the law.

Mr. BOUCHER. Would the gentleman yield to me for just a moment on that point, for clarity, because it is so important? What is being proposed is that the Copyright Office, on its own authority, create this safe harbor. So it would not require a change in the statutory law.

Mr. RICHARDS. The Copyright Office also—oh, excuse me.

Mr. BACHUS. You all were held to have violated a copyright law—

Mr. RICHARDS. Yes, we were.

Mr. BACHUS [continuing]. Because of section 115.

Mr. RICHARDS. Because of section 115?

Mr. BACHUS. Is that—is that the section you violated?

Mr. RICHARDS. I do not think so, no.

Mr. BACHUS. What—it was a clear and indefensible copyright infringement. What was that about?

Mr. RICHARDS. What were we sued for?

Mr. BACHUS. You were actually found—you were adjudicated to have violated the copyright—.

Mr. RICHARDS. I think that's true, and I think the—well, the laws are out of date. They weren't ready to handle the Internet. We've paid our licenses—.

Mr. BACHUS. Well now, didn't other services follow the law? Was it not your business model that violated the law? Could you not—

Mr. RICHARDS. I think my business model violated the law under the fair use issue. We believe that if you purchased a CD and we could prove that you had it in your possession, that we would allow you to play it back to yourself, and that was ruled by a judge not to be the case.

Mr. BACHUS. Had you cleared the licensing rights before launching your service, you wouldn't have been in violation.

Mr. RICHARDS. That's true.

Mr. BACHUS. Okay. So what—you're basically—your business model and the way you're functioning actually anticipated to change the law to be legal.

Mr. RICHARDS. Are we going back to the lawsuits, or are we talking about where we are today after we've licensed from every major record company and 25,000 publishers? Would you like to discuss the lawsuit?

Mr. BACHUS. Well, you have gotten—you've gotten 200 license—you've actually cleared the rights to over 200,000 licensing requests today, right?

Mr. RICHARDS. Yeah. We—in 6 months we've cleared, through just the Harry Fox Agency, 200,000 of the 900,000 we request.

Mr. BACHUS. But now they say the remaining requests are flawed. What—how do you respond to that?

Mr. RICHARDS. I'm sorry, I didn't hear you.

Mr. BACHUS. They say that the other requests are flawed. How do you respond to that?

Mr. RICHARDS. That the other requests that we make with—you know, I'm not—I'm not sure I have a squabble with the Harry Fox Agency that's a matter here. I think Harry Fox Agency and I will work things out. We've paid \$30 million. I think it's clear that it's in our best interest to work that out as quickly as possible—.

Mr. BACHUS. Okay.

Mr. RICHARDS [continuing]. And so we're doing everything we can—.

Mr. BACHUS. So you think that is—.

Mr. RICHARDS. I think it's the other 30 percent that causes everybody here a whole bunch of problem.

Mr. BACHUS. Okay. All right.

Mr. Stoller, what's the status of your negotiations with the recording industry concerning, you know, just Internet licensing?

Mr. STOLLER. We're very happy to license the Internet music companies and the—if they turn out to be the record companies themselves delivering music over the Internet. We're very happy to license them. We have issued many licenses already to many Internet companies. The fact that the music publishers must—the music—excuse me, that the record companies must first grant a license either to themselves as an Internet company or to an independent Internet company before we can license them may have held up the process.

Mr. BACHUS. So that's what you think maybe has held up the agreement in most cases?

Mr. STOLLER. That is my understanding of what has occurred.

Mr. BACHUS. Do you think the marketplace can work this out, or do you believe—

Mr. STOLLER. Yes. I think it should work it out. I would like to point out that the only one under a compulsory license are the songwriters and music publishers. We are limited in how much we can request under the 1995 Copyright Act, and I believe that 2 years ago there was an agreement between the RIAA, the National Music Publishers' Association and the Internet that 7-1/2 cents was an agreed-to rate for downloading.

It's my feeling that the record companies, who are now proposing to be the Internet companies, feel that that might be too high. We cannot ask for more. We are constrained in that way. They are not constrained to any compulsory fee or license for their products; only we are. But we're willing to negotiate.

Mr. BACHUS. Thank you.

Mr. COBLE. The gentleman's time—

Mr. BACHUS. My time has expired. In fairness, maybe someone else can ask, let the other side respond.

Mr. COBLE. The gentleman's time has expired. We will have a second round, I say, Mr. Bachus.

The gentleman from Florida, Mr. Wexler.

Mr. WEXLER. Thank you, Mr. Chairman. If I could follow Mr. Bachus' comments to Mr. Richards, I'm trying to understand the public policy urgency for Congress to step into what I think is an admittedly infancy scenario in term of technology and impose its will on a marketplace that hasn't even yet really had an opportunity to develop or operate.

If we take Mr. Bronfman at his word, which to my knowledge is no reason to think otherwise—and I don't know that he represents the entire industry, maybe he just represents his particular company. But he says here today that in response to Mr. Berman's question, that he intends—his company intends to license as broadly as possible, no monopolistic approach. I think, quite candidly, he says if that turns out not to be the case—if I understood Mr. Bronfman's testimony—well, then do something then, Congress.

But if we take Mr. Bronfman at his word—and let's assume that is characteristic of the industry, and if licensing occurs as broadly as possible as the technology becomes available, then what public policy imperative is there for Congress, before the marketplace even gets an opportunity to test itself, to mandate it? And when I say mandate it, it's mandating a license; mandating, in effect, a price or wage control.

Mr. RICHARDS. I think that it's—has to be extraordinary when that time occurs. I think Mr. Bronfman and I think all the other major music companies and independents that are visible have been quite willing to license their sound recordings. We've licensed them. I think the society—the right societies and the collection societies, like Harry Fox, they were quite willing to license the publishing, so that I could match up the publishing with the sound recordings, so that I could then allow consumers to listen to their own albums.

What happens is we fall short by thousands and thousands and thousands of folks that we need to contact or this marketplace can't occur. We're not saying we don't want to pay them. We've proven we want to pay them and license everything. We're saying we can't find them, and neither can anybody at this table find them.

So if you want to listen to an album and make as much music available as possible on the Internet so that other kinds of technologies don't bypass rights-holders and bypass payment systems, then we have to move with great speed and care to ensure that all of the publishers are covered, protected through section 115, because I don't know of anybody here that is going to get up any kind of a digital locker service if they've got to go locate, negotiate, and find 6,000 people, 7,000 publishers that are not represented by the Harry Fox Agency.

Mr. WEXLER. But with all due respect—and I understand how important music is both in terms of a marketable item and to individual people, but we're not talking about medicine here for a deadly disease. We're not talking about electricity. We're not talking about gasoline. We're talking about music. And knowing as little as I do, I would imagine that the music most people most often listen to is in fact represented by people like the company that Mr. Bronfman is a part of, or The Harry Fox Agency, and so forth. So these publishers that you're talking about that can't be found, by and large are probably—you know, you're asking us to do the extraordinary. Congress should step into a private sector, regulate the Internet now, tell them how to do it, so that publishers that can't be found, that arguably can't be found, we will now impose a public policy regulation. That's what you're telling us we should do. Right?

Mr. RICHARDS. No. I'm telling you to make the existing law you wrote work. It exists. It's here. All I want it to do is work so that we can access it.

Mr. WEXLER. But if I understand your comments, it does work, or it is working as to all the people represented by The Harry Fox Agency. It will work as to everything related to Universal. It will work as to every significant recording company, record company, that in fact licenses as broadly as possible. It will work, right, the current law?

Mr. RICHARDS. No, 115 doesn't work; 115 is a law that was written by Congress that I'd like to access that I cannot access because of—they handled what, 100, 150 requests last year? I think that's about the number. And I want them to handle 1 million requests. They don't have computers. I can't give it to them on disk. I have to fill out pieces of paper. You take a look at—it just doesn't work. I just want the law, that the lawmakers that we respect wrote, to

function as intended. And because of the pure mass of the requests that occur on the Internet, it can't function that way unless you guys step in and help us out.

Mr. WEXLER. My time is up, Mr. Chairman. Thank you very much.

Mr. COBLE. I recognize the gentleman from Florida, Mr. Scarborough, for 5 minutes.

Mr. SCARBOROUGH. Thank you, Mr. Chairman. And as I—I must admit I'm ashamed to be a user of Napster. I—I'm trying to get past that awful habit. But I do want to say, Mr. Bronfman, that I was able to see Duet being used, I guess it was about a month or so ago, and I am very, very impressed by the possibilities of Duet and believe that that really, even more than court challenges and all the other legal maneuvering that's going on—what you're doing with Duet and what other record companies are starting to do, I think it moves us down the road in a way where we resolve this—this dilemma in the marketplace, instead of in courtrooms or instead of in congressional hearings. So I just wanted to tell you for the record, I was impressed with that.

And Mr. Stoller, it's certainly an honor to be here in front of you, a man that—I'm going to say some nice things about you before I ask you some tough questions. You really did—you know, I don't know if everybody understands just how your songs not only changed popular music, but they helped change pop culture. And Mr. Lovett talked about how—as far as songs changing the American economy and have influence across the world.

I was touched by the fact during the China spy plane dispute that what actually brought the American hostages and the Chinese prisoners together was the fact that at night the American hostages sang Hotel California, and the Chinese soldiers actually came to them, whispering, asking them for the lyrics to Hotel California. So I guess Don Henley is an ambassador to China now, in a sense.

So I don't think you—I don't think you can understate the importance of music and of songwriting. As a songwriter myself—certainly Elvis has never covered any of my songs, Mr. Stoller, but as a songwriter myself, I understand that that property is more important to me, whether anybody else ever hears it or not, than any other property I'll ever hear or any other property I'll ever purchase. It's a very personal thing.

However—and this is the "however"—I don't understand one thing. Okay. Let's say, for instance, I buy an Elvis anthology in Pensacola, Florida, the area I represent, and instead of having to cart it back and forth from Pensacola to Washington, Pensacola to Washington every week, what's wrong with me accessing that on Duet or MP3 if I've already purchased an Elvis anthology and you're already getting—and, again, this isn't a leading question. I want you to explain it to me. I thought when I purchased that, you would have gotten your royalties for Heartbreak Hotel and Hound Dog and any other songs that—.

Mr. STOLLER. I didn't write Heartbreak Hotel. I'm sorry to interrupt you.

Mr. SCARBOROUGH. Oh, I'm sorry. I thought they said that. Was that Hoyt Axton? Or whoever—whoever it was—.

Mr. STOLLER. Mae Axton.

Mr. SCARBOROUGH. Whoever. Whatever Elvis songs you wrote, didn't you already get your royalties when I purchased that? So instead of me having to put that in my suitcase, why couldn't I just download it in a streaming format. I guess "downloading" is the wrong technical term. But let's say I go to Duet or MP3. Haven't you already gotten your royalties from me? And how is that different for me also listening to your Elvis songs, or Big Bopper songs, or whatever songs, on the radio, which is already covered under, I guess, 115?

Mr. STOLLER. Well, first of all, I have to explain to you that I'm not a techie in any way, and I don't even pretend to understand how streaming and downloads, et cetera, et cetera, work. But I know that they are being done, and I know that my songs and the songs of Lyle Lovett and every other songwriter have been downloaded in the past few years, numerous times. When I say "numerous," I mean maybe a billion times altogether, with no one getting paid. And when these were downloaded in most cases, or in many cases—and I can't cite to you how many out of the billion or so downloads that took place, how many of them replaced the sale of a CD, other—what you're talking about is buying a CD and storing it in some method, which I don't understand.

So I can't really answer that question, because it's my understanding that most downloads are—rather than being after the purchase of a record, are in place of the purchase of a record, which deprives us of the royalty. In your particular case, you bought it. I don't know what happens to it after that. I don't personally understand it.

Mr. SCARBOROUGH. But isn't that your agreement with MP3, that if people have already purchased it and want to download—or want to get it from these personal lockers, which I guess—and Mr. Bronfman, it's also a streaming—a streaming format with Duet. Isn't that correct?

Mr. BRONFMAN. It will be both streaming and downloading with Duet.

Mr. SCARBOROUGH. Okay.

Mr. LOVETT. May I add to that—

Mr. SCARBOROUGH. Yes, sir.

Mr. LOVETT [continuing]. To what Mr. Stoller was saying? The purchase—it is true, in fact. You purchased the CD. You own the CD. But purchasing the CD—by purchasing the CD, it doesn't mean you own the music. You own the CD and certainly can play that anywhere you like. Involving a service that allows you to upload and then to listen through streaming or downloading, you're involving a service that is a business which uses our music to function, to operate. All we're saying—I think it's a wonderful use of technology, convenient for the consumer, it's a wonderful thing. We are just asking to be compensated for the use—once again, the separate use of our music in that case.

Mr. SCARBOROUGH. Beyond the sound recording itself, right? Beyond the—you're saying the CD is one thing that I purchase—

Mr. LOVETT. Yes.

Mr. SCARBOROUGH [continuing]. And you would say that my use of that music is limited to this—that disk. Correct?

Mr. LOVETT. Your ownership—

Mr. SCARBOROUGH. Ownership. Right.

Mr. LOVETT [continuing]. Is limited to that disk, yes.

Mr. COBLE. The gentleman's time has expired. We'll have a second round momentarily. Mr. Schiff, the gentleman from California, does not sit as a Member of the Subcommittee, but he's asked permission to ask one question, and I will grant that request.

Mr. SCHIFF. Mr. Chairman, thank you very much for that courtesy.

If I could direct this question to Mr. Lovett and Mr. Bronfman. I've heard from the various witnesses today a variety of explanations offered for the amount of time it's taken to bring music online in a legal way, and I wonder if you could comment on what you think the greatest obstacles are.

I've heard testimony that technology doesn't sufficiently exist to protect the rights-holder, that there's legal uncertainty over what the licensing rights or rates ought to be, that there's a simple unwillingness on behalf of some of the parties to adequately compensate others, that there's an antiquated system or bundle of rights that, in light of new technology, is simply unworkable.

And I wonder if you could comment on that whole range of issues that had been raised: what you think the most pointed obstacles are, and what you think this body ought to do, if anything, to deal with that.

Mr. BRONFMAN. Okay, let me give a short—since, Lyle, you look so eager to answer that question. Congressman, I think the answer can be divided into what has been obstacles and what obstacles remain. I think the greatest obstacles frankly have been technological in nature. It is an extraordinary task for a system to understand which rights are held by whom on each and every song. To track the number of times that song has been streamed or downloaded and to compensate those rights holders each and every time and also know what rights the person who has either downloaded or streamed those songs has purchased in connection with their purchase, and to do that millions or tens of millions of times a day.

That technological challenge is close to being resolved. That has been a very large impediment to a secure—to a secure system.

The impediment that remains quite frankly I hope we can resolve amongst ourselves, and that is that we need the music publishers to license in the way that sound recording companies have to allow music to be—to be used in the way the consumers want.

It's something that ought to be worked out amongst the parties. We do believe that rule 115, however, does cover these issues. It does require clarification and we have asked the Copyright Office to clarify that. With that clarification, we feel that we can get off and running, and we have indicated, frankly, that we would prefer to get the service up and running and track the uses that are used and whatever rate is applied, we will pay retroactively so that everybody is properly compensated.

I happen to be a songwriter as well, one of the 117,000 that Lyle is representing here today as a proud member of ASCAP. So I am both a songwriter myself and I am proud to say that I have received some nice checks from ASCAP. I represent a very large music publishing company, Universal Music Publishing, and obvi-

ously the largest recording company in the world at Universal Music.

These are complex issues; however, there is a way forward. We are not advocating congressional intervention. We are asking those for the Copyright Office, if we were not able to agree amongst ourselves, to at least apply a rate so that consumers can get what they receive and everyone can be properly compensated. That is the largest hurdle, I think, that remains to a vibrant digital music marketplace.

Mr. LOVETT. As Mr. Bronfman said, the questions about the Internet speak to the newness of the Internet. All of this, to my way of thinking, listening to everyone speak, everyone has the same goal here. We—we are enthusiastic and overwhelmingly excited about how we can all enjoy music by using the Internet. All of us are seeking simply fair compensation for our—our part. It seems to me that these kinds of discussions, how to decide how to handle how people are paid, would be a natural part of any new application, which the Internet is. The Internet is a new application.

In discussions that I see on television and that I read in the paper, I sometimes get the feeling that the Internet is viewed as a whole new world. The Internet to my way of thinking is an extension. The digital world is an extension of the analog world. Business principles that are now working in the analog world need simply be applied, adjusted perhaps, applied to this new digital world.

For example, a transmission, a radio broadcast being a transmission, an Internet transmission is a transmission and should be treated as a performance. A performance royalty would apply to that. A download, to my way of thinking, seems like a record sale. Whether it is one track as in selling a single or whether it is an entire album or a portion of an album, a download seems to me to be a record sale.

These issues seem—sound more complicated than they seem to me. Resolving these issues by the marketplace, I think, is quite possible. The Internet—the Internet will serve us all. The process by which we eventually agree on how things will work is exactly what we are going through.

Mr. COBLE. The gentleman's time has expired.

Mr. SCHIFF. Thank you, Mr. Chairman.

Mr. COBLE. Folks, we're going to go quickly into a second round and I will ask the Members to adhere to the 5-minute rule because I don't want to keep you here all night. I want to put two questions to Mr. Lovett.

Mr. Lovett, some would ask why should an Internet service provider be required to secure licenses from so many different sources just to play music? Should not one license suffice, they would ask? What would you say in response to that?

Mr. LOVETT. Well, Mr. Chairman, a song that you would hear on the Internet or that you would play, has, in fact, different elements of ownership. There are different entities that own that song. First, there's the songwriter who has ownership. Second, there's the record company who has produced that sound recording, paid for that sound recording and is hoping to make money from that sound recording. And there is the publisher who has ownership in that

song. And then there's also the artist, the recording artist, who has ownership.

So to be able to address the payment, and just to one source there, would be analogous to a business owner having the expectation of not having to write separate checks, for example, to his landlord, to his electric company, to his insurance company to be able to cover his costs that way. There are different owners who have to be paid separately.

Mr. COBLE. Let me extend that question, Mr. Lovett, in a little more detail. Let me give you a hypothetical. Most folks don't like hypotheticals, but let's assume that you write a song and record it for your record label. Is it your belief that you are entitled to royalties for the incidental copies, A; B, the performance of your musical composition; and C, the performer percentage from the sound recording performance all from a single digital transmission of that song?

Mr. LOVETT. Once again, Mr. Chairman, as a songwriter I would be entitled to a songwriting performance royalty from that. If that transmission were downloaded, I would be entitled to my part of that record sale.

Mr. COBLE. You know, I've had people in my office this week from Nashville, and this is a cruel joke, but he told me, and I'll share it with you all. He said the joke going around Nashville is how do you get a Nashville songwriter off your front porch? You pay for the pizza. Now that's just a sordid laughing "ha ha," but I guess it is true. Many songwriters are having second and third jobs to make a go waiting for the big hit.

Mr. STOLLER. I would just like to mention something that came to mind in terms of the discussion about paying for a mechanical royalty and a performance royalty, which in the past was always delivered separately, because it was a tangible record that was sold, and it was the sound broadcast over radio or television. And people seem to be objecting to these two royalties. Well, on the Internet they can be delivered simultaneously.

I went to the theater the other night in New York. I saw a great show called *The Producers*, and it was wonderful. They did not give me the CD, but they have advertised in the Playbill that you can buy the cast album in stores or over the Internet.

Now, when you go to a movie, you don't get a free DVD of the film. You see a performance of the film. Then if you want to see it again in your home, you have to go buy it.

Mr. COBLE. Yeah. Folks, let me make it clear, when I told my joke, I'm by no means laughing at pizza dealers because there is nothing wrong with dealing pizzas. But I tell you that to let it be known the gentleman from Nashville wanted to make it clear that everyone thinks he or she is a songwriter so they are living in opulence and oftentimes they are not.

Mr. Berman, the gentleman from California.

Mr. BERMAN. It's funny, Mr. Stoller, you would mention *The Producers*, because my guess is at least in talking with them, MP3 and RealNetworks think that if they end up having to pay for the sound recording and the performance and the server copy and the router copies and the cache copies and the proxy server copy and

the local machine copy, that they are going to have to buy 1,000 percent of the recording.

Mr. STOLLER. I don't think so.

Mr. BERMAN. But it leads to my broader question. Some say it's about process. Some say it's about money. And there is that joke about when they say it's not about money, it's about money.

Let's take a world where by and large the publishers association and the publishers that drive that association are happy with the compensation. I mean, they and the songwriters think this is a fair rate of return for this new way of delivering music, which recognizes, you know, all the different interests of all, and allows a commercially viable business to survive and deliver music this new way and enhance the consumers' ability to get music.

Tell us how you would envision, when we've reached that point, that the process could work to clear the rights and let it all go forward without anybody being worried about a lawsuit. Am I making myself clear? If you want your counsel or anybody else to get into that answer, I would be happy because—in other words, at the point where—

Mr. STOLLER. I do have—let me begin—

Mr. BERMAN. How would the process problem get solved once money was not the issue?

Mr. STOLLER. Well, I don't know what the problem would be.

Mr. BERMAN. Well, they talk about thousands of publishers and Harry Fox Agency, they talk about written forms for each streaming—maybe not each streaming, but all the songs, not being able to electronically file. I mean they've raised a lot of issues about process.

Mr. STOLLER. Congressman Berman, I don't think I can answer all of those questions instantly.

Mr. BERMAN. Yeah, but you guys have thought somewhere about when—when the money's right, here's how it could work.

Mr. STOLLER. Yeah, and in terms of licensing, for example, when an Internet music company licenses a sound recording, that sound—the owner of that sound recording must have a license from somebody and will know who that somebody is who owns that composition and they can provide that information to the Internet music company.

So, I don't think it's really that difficult to locate the owners of these rights, because the sound recording is owned by a company that has a mechanical license for that work in the first place.

As far as paying all the various parties—

Mr. BERMAN. In other words, just to make sure I understand, so MP3 or RealNetworks will go to the sound—the record company that got the license to make the sound recording originally—

Mr. STOLLER. In the first place.

Mr. BERMAN [continuing]. In the first place, and get the name, and what?

Mr. STOLLER. I don't see why that should be difficult.

Mr. BERMAN. How would the money get distributed? Who is going to distribute this money? What do they do? It's one thing you are making a sound recording. You have got 10 different songs. Different—

Mr. STOLLER. Theoretically, the record company is licensing themselves or a third party. And it would seem to me that if they are licensing a third party or if they are behaving as if they, themselves, are a third party, that the Internet distributor has to pay the various parties, including the record company.

Mr. GLASER. If I may, Congressman, my sense is that the issue here is that it is not simply a matter of negotiating with a relatively small number of entities, as what we did with setting up MusicNet, where we put a relationship in place with Warner's, AMI and Bertelsman. It is matter of the fact that a given album might have songs from 30 different songwriters. So literally you have to hand negotiate with each of those songwriters because there's not a standard framework in place.

Mr. BERMAN. Mr. Stoller, I think this is your counsel behind you? He—

Mr. COBLE. If you will suspend, Counsel. The Chairman of the full Committee has asked that only the panelists are allowed to speak. So convey to your client, then he will speak.

Mr. RICHARDS. And if I may while that is going on, the songwriter is the songwriter for all of time. The publisher changes and moves with fluidity. When the Beatles album was released by Capitol Records, there's a substantially—there was a different publisher than from today on that.

Publishing is bought and sold. The songwriter remains constant. Everybody doesn't keep track of the database, all the record companies don't keep track of the database of all of the publishing movement after they have put out their record. That publishing ownership could have transferred hundreds of times in a couple of decades, and does.

Mr. COBLE. Mr. Stoller, if you will make it quickly. Time is running out here.

Mr. STOLLER. My counsel advises me that the phono record business, the record companies have survived for many, many years with all of these rights that have to be paid out, including their artists, including the music publishers who then pay the writers. And in this case, if they are licensing in bulk to a sound recording which contains all these rights, they can easily be handled by an Internet music provider. The record companies have been doing it for years.

Mr. BERMAN. Mr. Chairman, just on that point, I realize my time has expired, so—but as I understand the way it works in the record company world, even for doing one sound recording, they end up on the mechanical sometimes finding out after that sound recording is already out in the store exactly who the publisher is, because there's a statutory thing, they pay them. In other words, they aren't even getting all the rights personally guaranteed before they actually issue the sound recording. In other words, there is a custom in the business that works it so that it is months afterwards.

Well, my time is expired but the real issue is how to make a reasonable process once we've gotten the issue of fair compensation out of the way.

Mr. COBLE. And, Mr. Stoller, we can exchange that subsequently all by mail if you like.

I recognize the gentleman from Utah for 5 minutes.

Mr. CANNON. Thank you, Mr. Chairman. Let me say this has been a remarkably enlightening panel. I apologize for the periods I had to be away, but it has been very interesting to hear your take on these issues and it's helped me quite a bit so far.

Mr. Glaser, if I could direct a question to you. The MusicNet demonstration was impressive. I was told it was impressive. I was not here to see it, unfortunately, but it was just a demonstration. Let me read from the New York Times: "by playing show and tell with their nascent services in front of the congressional panel, record company representatives are in part seeking to preempt any congressional effort to induce them to offer ongoing catalogs more quickly or completely than they might otherwise like."

This concerns me. Can you respond to the Times' charge that MusicNet is merely using a delaying tactic in the form of a slide show and not ready for prime time? And when will it be actually up and running?

Mr. GLASER. Just in the end, we have made the first public announcement of MusicNet today as part to show how far along we are. We started the development of MusicNet—"we" being RealNetworks—probably a year and a half ago in order to get the technology ready. We've been trying to license the kinds of licenses we have now succeeded in getting with Warner, AMI, and Bertelsman for probably about 6 years, to be honest with you. So it was a very protracted and at times frustrating process. And what we were able to announce on April 2nd from a licensing standpoint and a distribution standpoint with the major labels was a huge break throughout and it was not just sort of a show and tell kind of thing.

Certainly, the hearings here and the Senate hearings have been very helpful to focus the attention of the industry on solving problems and we are grateful for those. And—but I think in terms of when this stuff gets to the market commercially, AOL and RealNetworks have both said they expect to have consumer products in the market in late August or early September, and I believe quite honestly literally the only impediment to that, in addition to fixing bugs in software which we always do very energetically, is to make sure these publishing issues don't get in the way. We are very, very serious about bringing these kinds of products to the market in the next couple of months.

Mr. CANNON. Great, thank you. And let me direct a question to anyone on the panel who is interested in responding. It seems to me that the true power of the medium is that individuals are able to communicate and exchange information. That is the Internet that we're talking about. In the Napster case, it is MP3 files so that people can exchange those with one another without having to go through an aggregator of content to get the information.

This is powerful, it is revolutionary, and that is what people love about Napster, frankly. So as interesting and compelling as your products are, including Duet and others, MusicNet and so forth, I think we can agree that it is not a Napster-like peer-to-peer service. I believe the public wants to see the peer-to-peer nature of Napster preserved even if in a pay-for-play environment. As interesting as the music component of this debate is, I am most inter-

ested in ensuring that the peer-to-peer technology of Napster is preserved. Do any of you care to comment on that?

Mr. GLASER. If I might, yes. Because our demonstration was only 2-1/2 minutes rather than 5 minutes, I did not show you the peer-to-peer capabilities in the MusicNet client. There is the ability for people to designate which of their songs they want other people to see, and that would allow other MusicNet members to upload directly from their system as well. So we have set up MusicNet to be a secure downloading system and streaming system and also a peer-to-peer system. So we will have all three of those capabilities when we launch it.

Mr. CANNON. Thank you. Anyone else care to comment? Mr. Bronfman, you have been giving us a high level perspective on these issues. Have you considered peer-to-peer and the importance of that to the Internet as a whole and the American people and the rest of the world as a whole?

Mr. BRONFMAN. Yes, and I think it is absolutely vital that we recognize the difference between what's possible and what is legal and what is right. But clearly what is possible is a technology. And even the lawsuit against Napster was never against the technology, it was simply against the application of the technology. We think the peer-to-peer technology is a very powerful technology that if properly applied will be extremely beneficial to the music industry. Improperly applied of course can have dire consequences. So yes, I think you will see both in the MusicNet system, in the Duet system and in other systems to come a peer-to-peer aspect of the technology as well.

Mr. CANNON. Thank you, very much, Mr. Chairman. I yield back.

Mr. COBLE. Thank you. The gentleman from Alabama, 5 minutes.

Mr. BACHUS. Mr. Lovett, you are a performer and a songwriter. Can you explain to us how the interests and concerns of the performers and songwriters differ?

Mr. LOVETT. Certainly, Mr. Bachus. There are performers who are not songwriters. I'm very lucky that I've gotten to perform a lot of the songs that I write.

Songwriters have a concern with looking after their song, have an ownership in the song. Performers—performers, when a performer gets a song on the radio, the transmission on the radio serves to—as a promotional aid for the performer. Now, if that performer has written the song as well, he benefits as a songwriter. The benefit to the performer in that case is the sale of his records, his increased popularity, increased attendance at his shows, so he benefits in that way.

With—with regard to the Internet, this has given an opportunity for performers to speak and my being here simply shows that performers are given the opportunity to speak, as Mr. Henley in the last hearings asked that performers simply be given a voice in this—in this process.

It's—this discussion about how to apply the way monies are collected and figure out how the Internet works, it's given performers an opportunity to speak up and say, hey, give us a chance to say how we fit in.

Mr. BACHUS. Thank you. Mr. Bronfman, can you ever foresee—and this may be without regard to music publishing rights—can you ever see an instance or a point in time when Congress would need to intervene to assure that consumers have the right to obtain recordings over the Internet?

Mr. BRONFMAN. Well, again it's difficult to respond to a hypothetical situation. Let me say I think it's in all of our interests on this side of the table, sir, to make sure that that day doesn't come. I don't think that this is an area where Congress—where regulation and legislation ought to be required. I think the role that Congress has quite properly and I might say quite intelligently played is to set a legal framework which has allowed us to pursue a legal business. It's now up to us to negotiate.

There are laws on the books such as 115 that may need clarification in order for that to move forward. But beyond the simple clarification of laws already on the books, I don't believe further regulation or legislation is either necessary or appropriate at this time, and I hope if we all do our jobs and focus on getting this business in front of consumers as quickly as possible, it won't be necessary for some time to come.

Mr. BACHUS. There does appear to be a consensus that everybody wants the affected parties to work together to arrange business relationships and licensing agreements that serve their varied interest and I think everyone is mildly optimistic that can be done. Is that correct?

Mr. GLASER. Well, I'm mildly optimistic it can be done and I am only a little bit concerned that it can be done in a time frame that won't delay what I think will be a very, very, very exciting set of services to consumers. We have entered a period now where Napster is being narrowed in terms of what it offers to make sure that it complies with the court's ruling. So there is a vacuum out there and there are, you know, tens of millions of users, a high percentage who have indicated they would pay for those services. So there is a great opportunity for us to satisfy those consumer needs and I think even a delay—an unnecessary delay just of a couple of months because of these issues would be unfortunate and frankly could hurt the industry, because it might move the consumer base much more toward these new teletype services that are not only illegal but much, much harder to track down and stop.

Mr. COBLE. The gentleman's time has expired. The gentleman from Virginia is recognized for 5 minutes.

Mr. GOODLATTE. Thank you, Mr. Chairman, and thank you for holding this hearing. I apologize for not being here for much of it. But this is an area in which I have a great deal of interest, and I'd like to particularly ask the panel about where we go from here.

I'm encouraged to hear of some of the technological developments and the changes in the business models that are occurring in the music industry. I think that you are going to make your products available to consumers in a way that still recognizes and protects copyright but also gets them to them in a more inexpensive and usable fashion. But I know that those are not the only obstacles and I know that Universal, Mr. Bronfman, has been sued by the music publishers with regard to the launch of Farm Club. And while I'm not going to ask you about that pending litigation, I would like to

know about what you think the Copyright Office should do to use their authority to make it possible for services to enter the market before all the details of payment under the compulsory license are worked out. We are talking about an initial period of time in which hundreds of thousands of works are going to be coming under new licensing agreements all at the same time, and I'm wondering if there is some way to assure that publishers and songwriters will be paid for their works without delaying the consumers' access to the music while this gets worked out. And I think Mr. Bronfman and Mr. Stoller certainly have opinions on that. Maybe other panelists do as well. Start with Mr. Bronfman.

Mr. BRONFMAN. Congressman, thank you. First of all, I would say I can't comment on pending litigation, but I think I would start by remarking that Congressman Wexler quite properly said we are talking here about music, not about medicine or gasoline or energy. On the other hand, I can tell you that Mr. Glaser's perspective is, I think, very correct, which is that there is real urgency for this industry to have a legitimate service. And in the context of the court decisions and the resulting narrow—narrowed Napster service, there is a window of opportunity for the industry to launch legitimate services and to avoid a second or a third or a fourth Napster from rearing its head and creating the impossibility for—

Mr. GOODLATTE. Tough to compete with free, in other words?

Mr. BRONFMAN. Very tough to compete with free. And I would suggest that it is not only on the music industry's behalf that this be protected, but in the interest of the United States to protect its intellectual property.

Therefore, I think there is some urgency here that we move forward. And essentially what we have asked the Copyright Office to do is to essentially grant a safe harbor so that we can go forward with these services and pay retroactively whatever the decision is, whether it is freely negotiated between the parties or ultimately arbitrated through the Copyright Office. We will pay the songwriters, the publishers and any other copyright holder on a retroactive basis, but we would like not to be delayed by the sheer size and complexity of the task ahead in terms of the licensing of the publishing rights to be prevented some getting into the marketplace and giving consumers what they want. We think doing so would be very short-sighted because it could ultimately harm the industry irreparably, an industry which has already suffered 18 months of a very difficult circumstance given the Napster effect. If we were to go through that again, I'm not sure the strength of this industry would ever be the same again.

Mr. GOODLATTE. Thank you. Mr. Stoller?

Mr. STOLLER. Well, I think we are all hoping for the same thing. But the element of safe harbor is, in effect, making the copyright meaningless. Because if we cannot protect our rights under the copyright law, then we have no protection whatsoever. We are willing to meet. We are willing to discuss. We are willing to talk.

Mr. GOODLATTE. But do you think it's in the interest of songwriters and producers of music to delay those entities in the market that are going to generate a return for your clients, while at the same time—

Mr. STOLLER. No, we're willing to start talking—.

Mr. GOODLATTE. Well, let me finish and I'll let you finish.

Mr. STOLLER. I beg your pardon.

Mr. COBLE. The gentleman from Virginia will suspend. I will ask you, my good friend, to do it quickly because we have been here almost 3 hours.

Mr. GOODLATTE. I will. The issue is whether we are going to experience a loss of opportunity to generate a new business model because we wait too long and then the successor to Napster and other such entities, that in my opinion were in violation of copyright law, cause a further erosion of the value of copyright in our society.

Mr. STOLLER. Well, I understand what you are saying. But there is already a compulsory rate in 115, and a compulsory rate that was agreed to 2 years ago by all the parties here. And it is my opinion that, with due respect, Mr. Bronfman would like to pay less than what was agreed to 2 years ago. He would like to get it for less. And I'm saying maybe we should come to terms. But why—why should we hold it up? Why not pay us what we are supposed to get now and we'll negotiate?

Mr. GOODLATTE. Mr. Chairman, if we could give Mr. Richards the final word and I will cease and desist after that.

Mr. COBLE. If Mr. Richards could accelerate his delivery.

Mr. RICHARD. I will accelerate, sir. Thank you, Mr. Chairman.

I think it is clear that everybody, certainly the software producer, Mr. Glazer, an Internet service provider, and Mr. Bronfman, who owns copyrights both in the publishing arena and in the master recording arena, are all saying the same thing to Congress: Help. Please urge the Copyright Office under 115(b) to help us access this unique window of opportunity to get these services up and robust.

And I'll let everybody else discuss how much should be paid for it. There is no rate in 115. But we need to get up and we need to get up now while we have this chance. And everybody on this panel agrees. And all we ask the Congress to do is urge the Copyright Office to make the procedures and a safe harbor for 115.

Mr. COBLE. I thank you, Mr. Richards. I thank the gentleman from Virginia. Folks, let me think aloud a minute prior to adjourning. I thank all of you for being here. I thank the panelists in particular. This has been a very worthwhile hearing.

It is my belief, folks, that when parties to an issue are in disagreement, the best of all worlds results when those parties can get together—be it at the woodshed, at the dining room, or wherever—and resolve those differences, because when third parties come in and begin to stir the broth, that may end up with a less favorable result. I'm not telling you all what to do, but I'm at least suggesting that.

And I think Mr. Berman wanted to weigh in similarly, did you not, Howard?

Mr. BERMAN. Yes, Mr. Chairman, just in closing I guess and Mr.—I mean, the point has been made, but the songwriters, publishers and record companies have gotten some good judicial rulings that reaffirm our copyright laws and the right of songwriters and, you know, the people associated with them, to be compensated for this new way of using music. I just want all parties to come to-

gether because I do believe you can work that process out. I don't know whether the law presently lets the Copyright Office do that—do what we want or not. Maybe it does. We'll take a look at that.

But I know everything will go easier if you guys can work together in the understanding of the right of the songwriters and publishers to get an appropriate level of compensation for this that doesn't destroy the business model. And then we

can—the other things will start falling into place somehow, I really do believe.

Mr. COBLE. Now, when I suggested the woodshed, that was not a good suggestion. Woodshed usually smacks of punishment. Do it on the patio or the bar.

Mr. BERMAN. And, Mr. Chairman—

Mr. COBLE. Go ahead.

Mr. BERMAN. Just the last—the only thing I do fear, it would be terrible if we—if we kill the goose that lays the golden egg because in the end some of these things that technology can't track, and the courts can't effectively find a remedy for, end up springing up in place of what the courts have now said were illegal infringements of copyright, and that is a concern here.

Mr. COBLE. Gentlemen, let me revisit this issue before we adjourn. Much has been said about the proceeding in the Copyright Office regarding the questions surrounding section 115 license. I understand that the Copyright Office has not determined if, in fact, it has the authority to resolve these questions. And I say very frankly to you all, I don't know with certainty whether the Copyright Office does or not.

Now, our Subcommittee and our staffs have very good rapport with the Copyright Office, with Marybeth Peters, the Registrar, in particular. And we will continue to plow this field very fervently and very diligently and hopefully come up with a good answer.

This concludes the oversight hearing on music on the Internet. The record will remain open for 1 week. I thank you again, and the Subcommittee stands adjourned.

[Whereupon, at 3:55 p.m., the Subcommittee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF MICHIGAN

The Internet presents one of the most profound paradoxes of the 21st Century. In just the past year, copyright holders have gone from being the victims of large-scale Internet piracy to seeking to embrace the Internet to market their works. In essence, they are trying to take advantage of the very technology that once threatened their livelihood.

Despite this turnaround, though, music is still not widely available online, and we are hearing that is partly because of the difficulty in getting licenses from music publishers over the compositions that underlie each song. Those seeking licenses claim the procedures are outdated and the law is not clear on which online music systems require which licenses. There are even suggestions that Congress should alter the licensing scheme into a “blanket” license so that users of compositions pay royalties into a pool and the Copyright Office divvies up the money between the publishers.

Let me state that I am one Member who would be concerned with proposals limiting the ability of songwriters and publishers to negotiate licenses for their compositions. Despite the fact that they actually create and write the songs we listen to, songwriters and publishers receive the lowest royalties in the music industry.

For that reason, publishers should not be penalized for protecting their property rights in the same way the music labels have done—especially when negotiating with Internet companies over online music royalties. Besides, the market shows the publishers have not abused their power and have licensed their works to over 30 Internet companies; this actually makes sense because the publishers only make money when they license compositions. They have no incentive to keep music off the Internet.

In short, I hope we can let the market work before we introduce more regulations into an already heavily-regulated content industry. The last thing we want to do is create further obstacles to creativity.

PREPARED STATEMENT OF THE HONORABLE HOWARD L. BERMAN, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF CALIFORNIA

Thank you for calling this hearing on online music. You have put together a fine panel of witnesses who should give us relevant and timely testimony. I want to thank you for expanding the panel to five witnesses in order to accommodate the variety of voices that seek to be heard on this contentious issue.

I am excited about the myriad possibilities for online music. If there is a better “killer app” for the Internet than delivery, promotion, and performance of music, it hasn’t shown itself. Think about the possibilities:

- By doing away with “shelf space” constraints and virtually eliminating reproduction and distribution costs, the Internet enables obscure titles from back catalogues long out of print to be made available online alongside recent Billboard chart-toppers.
- The Internet enables music retailers to offer consumers exactly the two songs they want at a customized price, rather than requiring consumers to purchase a whole CD at an unattractive price to get those two songs.
- The Internet enables consumers to access their complete music library or a “celestial jukebox” any time and from any Internet-enabled device—whether car stereo, PC, Palm Pilot, or cell phone.
- The Internet enables consumers to sample a nearly endless supply of music from the comfort of their own home and in a variety of formats—whether one-time plays, 45 second sound bites, or degraded quality listens—before making a purchase decision.
- The Internet enables millions of audio broadcasts to occur simultaneously, each accessible to listeners around the globe, and each tailored for lovers of a particular genre or sub-genre.
- The Internet enables even the smallest artist or independent record label to sell and communicate directly to music consumers, and enables consumers who don’t know a song’s web address, label, title, or even artist to easily find the music through search engines, browsers, and other information location tools.
- The Internet enables the near costless reproduction and distribution of music, and so should bring down the cost of music when made available online.

The music possibilities enabled by the Internet seem on the verge of realization. Certainly, the demand for online music is there—if nothing else, Napster has demonstrated that.

Now it appears that the supply of online music is beginning to catch up with the demand. While the music industry may have been slow to jump into the online music market, lately the pace of online music deal-making has been dizzying.

I am sure that today we will hear a lot about the two biggest deals—the creation of Duet by Vivendi Universal and Sony, and the creation of MusicNet by EMI, BMG, AOL Time Warner and RealNetworks. Certainly these two deals are remarkable because they promise to make a huge amount of new music instantly available online. But it should be noted that a countless number of smaller deals have also been cut for a mind-numbing array of online music services. For example, EMI licensed and invested in Giga to sell downloadable music to the Taiwanese market; Sony licensed Loudeye to offer samples of Sony songs and thumbnails of album covers; Universal Music purchased GetMusic.com, which will continue to carry music from other labels like BMG; RIAA members licensed Kickworks to use their music for its free, ad-based Internet radio service; Capitol Records is promoting its music through Aimster; and BMG has invested in Napster with the goal of making its music legally downloadable through Napster. In fact, music is legally available in a variety of formats on literally hundreds of websites today.

Despite these deals, we continue to hear criticism that the online music market has not evolved quickly enough to satisfy consumer demand. Specifically, we hear that consumers want access to all the music ever published in an on-demand, interactive format, and that copyright owners of sound recordings and musical compositions have not made their works available to satisfy this demand.

I am sure that consumers really do want such convenience. I am also sure that consumers would like all movies, software, books, photographs, recipes, needlepoint designs, and architectural drawings available in such a format. They would probably also like a guarantee of gasoline at under \$2 a gallon, price caps on drug prices, free upgrades of computer software, and Coca-Cola at the greatly reduced price charged in most developing countries.

My point is a serious one. Only in extraordinary circumstances, such as demonstrable market breakdowns caused by antitrust violations, does our government require property owners to make their property available to the public at government-established rates.

Furthermore, copyrights are Constitutionally-sanctioned property, and music, despite its emotive power and cultural significance, is basically entertainment. One may credibly argue that property rights sometimes need to be limited to address an energy crisis or epidemic, but convenience of access to entertainment seems a particularly weak justification for the abridgement of Constitutionally-sanctioned property rights.

It is especially difficult to justify government interference with property rights when the free market, however fitfully, appears to be moving in the right direction. MP3.com, which is testifying today, operates my.mp3.com, a digital music locker service that provides on-demand streaming of one's music library. As I understand it, when they go online, Duet and MusicNet likewise plan to non-exclusively license other companies to provide on demand, interactive streams.

I don't think government intervention is justified just because interactive streaming services won't immediately be able to provide consumer access to ALL the music out there. Why is it so essential that all music be available right now on a variety of individual websites? This certainly isn't the case with the offline world. Wal-Mart, Best Buy, and other mass merchants are responsible for a substantial percentage of all retail music sold, and yet carry only about 4000 titles each. Tower Records, the "superstore" of all music retailers, carries approximately 80,000 titles in each store. These retailers appear to be perfectly successful carrying only a small percentage of the quarter-million titles currently on the market and a tiny percentage of the millions of albums recorded.

If music buyers are willing to shop in record store that carries a mere fraction of published music, why can't online, interactive streaming services find success initially carrying only 70%, or 50%, or 25% of the music out there? Even if any one interactive streaming service can only stream 25% of published music, it still provides consumers with exponentially greater musical choice than any existing record store, broadcaster, or music subscription service. If interactive services go online, as many have, with the music for which they can secure all necessary licenses, owners of the copyrighted music not yet licensed will come flocking to tap into that market. Basic principles of market economics operate online as well: owners of sound recording and musical composition copyrights will not act irrationally by passing up a new revenue stream.

Even if compelling justifications could be found for government interference with rights of copyright owners, I am disturbed by the implications of what would essentially be Internet-specific government regulation.

For years, Congress has been told that government should not regulate the Internet. The high-tech sector has persuasively argued that government is far too slow and "out of it" to effectively legislate industries that are growing and changing at Internet speed. Any Internet legislation we pass, it is argued, would be outdated before it was enacted, and might run the risk of freezing or stifling technological developments in the Internet sector. It was further argued that the incredible dynamism evident in the Internet was the direct result of the minimal government regulation covering it.

I don't understand why the dynamic is any different in the online music space. In fact, an objective analysis indicates the dynamic is exactly the same. Less than a year ago, we heard that the big stumbling block to the success of online music companies was their inability to secure licenses from the owners of sound recording copyrights. Today, that complaint is infrequently heard, and in fact several online music business executives have told me that reasonable licenses are available from the owners of sound recordings. As this hearing will show, the complaint now is about an inability to get licenses from owners of musical composition copyrights.

As my colleagues can attest, there is no way we would have legislated on the sound recording license issue more quickly than the market solved it. In fact, if we had sought to legislate last year on the sound recording licensing issue, we would likely still be at it this year despite the fact that the market has made such legislation largely irrelevant.

Once the legislative process is set in motion, it is very difficult to control. Legislation to mandate access to licenses for online use of sound recordings or musical compositions might end up containing mandates for the use of certain security technologies, onerous accounting and auditing requirements, caps on the prices consumers can be charged, and ostensibly unrelated quid pro quos. That is just the nature of the legislative process, and anyone who want the Internet to remain unregu-

lated should understand that the risks of inviting regulation may greatly outweigh the apparent immediate benefits.

With this philosophical grounding, it should come as no surprise that I see no need or good reason for sweeping legislation regarding online music. I do not deny that several obstacles seem to remain in the way of full-scale realization of online music possibilities. Nor do I deny that some of these obstacles are created by an inability to secure licenses from copyright owners or confusion as to whether certain activities require licenses. However, it is obvious that all parties have strong pecuniary incentives to resolve these problems, and I have observed that such incentives are a powerful motivator.

PREPARED STATEMENT OF ELTON GALLEGLY, A MEMBER OF CONGRESS FROM THE
STATE OF CALIFORNIA

Mr. Chairman, members of the subcommittee, and panel members, we are here today to discuss the increasingly relevant topic of online music. Brought to the forefront by the advent of and ensuing litigation surrounding Napster, this issue has now grown to encompass many more services and business models, such as MP3.com, farmclub.com, and Sony Duet. This growth, which shows no signs of decline, forces us to visit this issue of music on the Internet, and I applaud the chairman for calling this hearing.

I am a champion of protecting intellectual property rights. Whether it is the patent that protects a biotechnology pharmaceutical, the trademark that protects a company slogan, or the copyright that protects a song, I consider these rights to be as important and tangible as an individual's property rights in his/her automobile or home. They are all property rights that should not be infringed.

I am also a champion of new technology that benefits consumers, including that before us today—the ability to access, listen to, and purchase music over the Internet.

Listening to music over the Internet has now become “old hat” to millions of citizens. I would like to find a way to ensure that individuals can listen to music over the Internet, without infringing upon the rights of intellectual property holders, and I hope that today's hearing will give us more insight into the different means by which we can accomplish this. Thank you.

PREPARED STATEMENT OF MANUS COONEY, VICE PRESIDENT FOR CORPORATE &
PUBLIC POLICY DEVELOPMENT NAPSTER, INC

INTRODUCTION

Mr. Chairman and distinguished members of the Committee on the Judiciary, I appreciate your willingness to examine the issue of onlinemusic. I believe the fundamental question this hearing will require you to ask is: What does it take to make music on the Internet a fair and profitable business? Napster believes the Congress needs to consider all options including legislative options such as an industry-wide license in its search for an answer to this question. The Internet needs a simple, objective, and comprehensive solution, similar to the sort of solution that allowed radio to succeed. The Internet does not need another decade of litigation. Congress needs to clarify the law so that all distributive media can compete on an equal footing.

This is a very complex area of the law and I know many of you have worked for years to develop a legal environment that will advance, rather than retard, the development of the online music marketplace. The challenge for Congress has been difficult but you have taken repeated steps to facilitate the growth of this nascent marketplace. Indeed, since 1995, Congress has passed several bills that contained provisions aimed at updating our copyright laws to adjust to the unique challenges of the Internet. However, the complex and uncertain legal environment has stimulated litigation rather than innovation. Indeed, most of today's panelists have recently been - or still are - a party to online music-related litigation involving another panelist. Even copyright owners have sued one another over their respective rights in the online music marketplace.

NAPSTER BACKGROUND

Before we explore these issues, I would like to summarize for the Committee the history of Napster. As you know, Napster has been the subject of considerable attention. Shawn Fanning, then an 18-yearold freshman at Northeastern University, invented the Napster software

in 1999 and, in doing so, unleashed the fastest growing application in the history of the Internet. The Napster application has been installed more than 80 million times. The service has experienced peak use of more than 1.8 million people simultaneously and approximately 10 million unique IP addresses in one day.

The Napster software is a revolutionary technology based on person-to-person, non-commercial file sharing. The Napster application enables computer users to locate and share music files from one convenient, easy-to-use interface. The files are not stored on a central computer like most Internet music services. Rather, the music is stored on the hard drives of each of the millions of Napster users.

So who are Napster's users? They are people of all races, income levels, and ages who really love music. In fact, 86% have purchased CDs in the past six months and, on average, they have bought nine CDs in the past six months. Fully two-thirds (67%) say they use Napster to try out music before buying and they have a wide range of musical interests including jazz, pop, inspirational, gospel, R&B, and many, many more.

The Napster application allows users to share their music files. If they choose to share files - and they are not required to - the application makes a list of the files designated by the users to share and incorporates that users' list into the central Napster directory. The Napster directory is a list of all the files that members of the community are willing to share. Music files are shared by Napster users - person to person. It is the peer-to-peer nature of Napster that is so revolutionary and so powerful. This is what Intel's Andy Grove was referring to when he said that Napster could "Irrearchitecture" the Internet. It is a service that is easy to use, reliable, scalable, ubiquitous, and with limitless reach.

NAPSTER LITIGATION

On December 6, 1999, the 18 affiliates of the 5 major recording labels - Warner Music Group (Warner), Universal Music Group Universal), EMI, BMG, and Sony Music - filed a federal copyright lawsuit (A&M Records et al. v. Napster) seeking damages and injunctive relief against Napster, Inc. Warner is part of AOL-Time Warner, Universal is part of Vivendi Universal, and Sony Music is a division of the Sony Corporation. These companies allege that Napster's users all are violating copyrights and that the Napster peer-to-peer file sharing technology and Internet directory service made Napster contributorily and vicariously liable for its users' alleged copyright infringement. On January 7, 2000, songwriter/publisher Jerry Leiber and others filed a second action alleging similar claims. Five additional lawsuits

were filed later against Napster by various recording industry entities, one of which, filed by TVT, has been resolved by agreement to license Napster and its users.

It is worth noting that it never has been alleged that Napster itself directly infringed a single copyrighted work. Rather, the labels allege the user-public is engaging in infringement and that Napster has enabled and/or could control the acts of infringement. Contributory infringement and vicarious infringement are not expressly recognized in the 1976 Copyright Act. Rather, they are court-made theories of legal liability which have been derived from the Act.

On June 12, 2000, the plaintiffs in the A&M Records and Leiber actions moved for a preliminary injunction (pre-trial order) and, on July 26, 2000, the District Court granted the plaintiff's motion. The District Court, in a broadly worded and then amended order, enjoined Napster from "engaging in, or facilitating others in copying downloading, uploading, transmitting, or distributing" copyrighted works "without express permission of the rights owner." On July 28, 2000, an emergency panel of the U.S. Court of Appeals for the Ninth Circuit granted Napster's motion to stay the District Court's pre-trial order pending an expedited appeal. The Ninth Circuit's stay order cited the "substantial questions of first impression 'going to both the merits and the form of the injunction' that Napster had raised. Oral arguments before the Court of Appeals took place on October 2, 2000, and the court issued its ruling on February 12, 2001.

The Ninth Circuit Court of Appeals affirmed the District Court's preliminary injunction against Napster, subject to a narrowing of the injunction's scope. The 3 judge Ninth Circuit Court panel ruled on the basis of what it recognized was an incomplete factual record established during the District Court proceeding, and thus void of the many developments that have taken place since the lower court proceedings (e.g., the Bertelsmann alliance and the TVT and Edel agreements). Napster disagrees with the Ninth Circuit Court's ruling and has appealed the court's decision.

The District Court's revised preliminary injunction requires copyright holders (in most cases, record companies and music publishers) who want music excluded from file-sharing to give Napster explicit notice about each recording they want to be excluded. That notice must include the following information: the work's title; the name of the featured recording artist performing it; the name(s) of one or more files containing the work available through Napster's filesharing service; and certification that the rightsholder owns or controls the rights to the work they want excluded.

After receiving an appropriate notice, the injunction requires Napster to filter the specified work from the Napster index. Napster also shares the burden with the rightsholder of identifying variations of file names in order to exclude as many differently-named versions of the file as possible, within the limits of the Napster system.

Napster has designed and implemented a file-filtering system and is complying with the District Court's injunction. More specifically, Napster has taken numerous steps to ensure that it complies with the District Court's preliminary injunction. First, Napster engineers have instituted an advanced three-step filtering system that blocks infringing files. Second, approximately 30% of Napster's workforce is tasked with manually searching for and entering into the filtering database file name variations. Napster also recently entered into agreements with Gracenote, Relatable, and Gigabeat, three music service companies that will enhance Napster's ability to filter noticed files and identify file name variations. Further, Napster amended its terms of service to provide that the company will deny users that attempt to circumvent Napster's filtering system access to the service. As a result of these compliance efforts, Napster's filtering system is, if anything, over-inclusive in that it blocks many non-infringing files.

MARKET BASED SOLUTIONS ARE NOT AVAILABLE

Today, Napster is free. But Napster believes that the Napster service is compelling and attractive enough that consumers are willing to pay for it so that artists, songwriters, the record labels, and other rights holders can get paid. In fact, 70% of Napster's users have said they will pay for continued access to the Napster service.

On February 20, 2001, Napster unveiled to the public the business model for its new membership-based service. The New Napster Service, which the company plans to launch this summer, will charge users a reasonable subscription fee so that Napster can pay all rights holders.

The New Napster Service will also integrate features that stress the promotional nature of the service, so as to insure that Napster continues to enhance CD pur-

chasing rather than supplant it. For example, the New Napster Service will: (1) allow Napster to limit our users ability to transfer a file to another device, in essence tethering the file to the user's computer; and (2) limit the sound quality through fidelity limitations of 128 kbps and lower.

Unfortunately, it does not appear as though the Courts will resolve the legal issues any time soon. And it is clear that the marketplace is not resolving these issues either. It should be emphasized that, notwithstanding our legal arguments in court, it has been Napster's persistent and unwavering focus to obtain licenses from the major record labels. Hank Barry, our Interim CEO, has tried for the last year to make an agreement under which Napster can get a license from the record companies and the music publishers in order that we all might coexist peacefully and guarantee payments to artists, songwriters and other rights holders. In fact, Hank Barry has spoken and met with the heads of each of the major labels on several occasions. In those discussions, he articulated the New Napster Service: one that is secure, tethered to the desktop, and which charges users a fair subscription fee. Napster believed that any such agreement with the labels would serve as a precedent for other agreements and could serve as the basis for payments by the people using Napster to recording artists and songwriters. We were able to reach an agreement with Bertelsmann on a business model for a new service and license terms for the sound recordings and the musical compositions they control. Yet, I cannot today report that any other such agreement has been reached with a major label.

Moreover, music distribution over the Internet is hampered by the incredibly complex and inefficient music licensing procedures that often involve multiple licensors for one particular song. Each song on a CD actually constitutes two copyrights. The first copyright is the sound recording, or the artist's performance, that the recording company (usually) owns. The second copyright, known as the musical composition, is the underlying musical work being performed. The complexity arises from the fact that the musical composition and the sound recording almost always are owned by separate companies or individuals. With approximately 3,000 recording companies and over 25,000 independent music publishers in the United States alone, the prospect of negotiating the sound recording and musical composition rights for every song for online distribution is virtually an impossible task. This situation has led to endless private negotiations and litigation. So what should Congress do? Congress should seriously consider enactment of an industry-wide license for music, commonly referred to as a compulsory license.

COMPULSORY LICENSE

Copyright is a tool of public policy that requires a constant balance between the public's interest in promoting creative expression and the public's interest in having access to works. And in its effort to strike a balance, Congress has consistently turned to the so-called compulsory (or industry-wide) license.

A compulsory license acts as a means to compel a copyright holder to license its programming to a distributor in return for the distributor paying a fee that is either statutorily or administratively prescribed. Congressional use of compulsory licenses generally occurs as the result of a desire to advance specific public policy goals within the framework of an inefficient marketplace. More specifically, compulsory licenses are used to: (1) allow for the implementation of a new technology while ensuring that rights holders are compensated; (2) encourage the widespread dissemination of information to the public through these new technologies; and (3) combat an inefficient marketplace (e.g., inability to obtain licenses from all relevant copyright holders, monopolistic environment, etc.) that otherwise would hinder the development of these new technologies. There are numerous examples in the last hundred years where Congress implemented a compulsory license system in response to these specific policy goals and market characteristics.

In 1909, Congress created a right against the reproduction of musical compositions in mechanical forms (i.e., piano rolls), but limited this right through the creation of a mechanical compulsory license for musical works. The legislative history behind the mechanical compulsory license reveals that Congress enacted this provision, not only to compensate composers, but to prevent one company - which had acquired mechanical reproduction rights from all of the nation's leading music publishers - from limiting the dissemination of the music to the public through the creation of a monopolistic environment.

Years later, Congress again enacted several additional compulsory licenses, this time related to consumers' ability to access broadcast transmissions via cable and satellite systems. In 1976, Congress passed a compulsory license for cable television systems that retransmit copyrighted works. Pursuant to the compulsory license pro-

vision, copyright owners are entitled to be paid prescribed royalty fees for a cable television company's secondary transmission of the copyrighted work embodied in television and radio broadcasts.

Then, in 1988, Congress passed the Satellite Home Viewer Act of 1988 (SHVA), which created a compulsory license system for satellite carriers that retransmit television broadcasts that operates similar to the cable compulsory license. Congress acted again in 1999 when it expanded the SHVA's scope to include local-into-local retransmission.

Congress recognized the ability of these then cutting edge technologies to further disseminate to the public television and radio content, and the need to ensure that rights holders remained adequately compensated. Congress also understood, however, the inefficiencies inherent in forcing cable or satellite providers to negotiate individual licensing agreements, thereby resulting in the use of a compulsory license system.

Interestingly enough, considering the current controversy, Congress' next foray into compulsory licenses applied specifically to music. The Digital Performance Rights in Sound Recordings Act of 1995 created a limited performance right for sound recordings, subject to a compulsory license for certain digital audio deliveries of sound recordings. The compulsory license originally applied, in general, to non-interactive satellite and cable audio digital deliveries. The Digital Millennium Copyright Act amended the original law to explicitly include non-interactive webcasting of sound recordings within the compulsory license's scope.

At the time, Congress reasoned that these new technologies promised to encourage the widespread dissemination of this music to the public. Once again, Congress enacted the compulsory license mechanism as a means to ensure that artists and other rights holders were compensated, while not hindering the continued development and deployment of these digital delivery systems.

Finally, it should also be noted that performing rights societies, such as ASCAP and BMI, enforce songwriters' and music publishers' performance rights through a court created process that operates, in effect, like a compulsory license by removing the need to negotiate with individual rights holders. While Congress did not create this procedure, it has implicitly endorsed it by recognizing these performing rights societies in recent legislation. Further, Congress repeatedly has refused requests to outlaw the use of these blanket licenses.

LICENSING PROBLEMS ARE NOT UNIQUE TO NAPSTER

As I mentioned a moment ago, the licensing problems are not necessarily unique to Napster. Indeed, much of the testimony at today's hearing is expected to focus attention on those circumstances under which the publishing compulsory license should apply to the Internet. Ironically, some of those who oppose Napster's suggestion that Congress consider an industry-wide compulsory license are supportive of compulsory licenses - so long as their copyright is not the subject of one.

One of the record labels represented at today's hearing recently made musical compositions available online without getting the publishers permission. The RIAA has gone to the copyright office after the fact arguing for a compulsory license for the publishers musical works. As part of the record labels consistent attack on nascent, nonproprietary media technology companies who have called for legislative action (i.e. MP3.com and Napster), the record labels have urged Congress to refrain from legislating and, instead, allow the market to resolve these issues. Indeed, Mr. Parsons criticized the "logical absurdity of trying to write regulations for an industry that doesn't even exist yet." Yet, it is possible that the record labels will directly, or indirectly, urge Congress and/or the Copyright office to do just that: conform the law or pressure the industry to accommodate their own proprietary business models but to not take action to accommodate other business models such as Napster's.

I believe the Committee should reject this clearly self-serving, double standard. If compulsory licensing is appropriate for radio, cable, television and satellite television and for publishing rights to sound recording, I believe it is fair to ask: why not here on the Internet? If the record labels currently benefit from a compulsory license and if they are looking to expand this license to give their respective business models an advantage, why shouldn't Congress consider covering them with the same licenses?

Mr. Chairman, Congress should not be picking winners and losers in the online music marketplace. Through legislation or other means, Congress should not be blessing one business model for the distribution of music online. Consider where our consumer electronics industry and motion picture industry would be today had Congress directed through legislation or pressure those technologies that had to be used in a vcr. Consider where we would be today if Congress sanctioned a Hollywood stu-

dio business model for the sale of vcrs - one that empowered the studios to prevent the sale of vcrs by companies it chose not to do business with. Fast forward more than twenty years and that is what some are suggesting that Congress facilitate today.

This is a moment of tremendous opportunity. And the question before this Committee is how to make the world of Internet music work -work simply, work objectively, and work fairly across business models. I submit that the Congress has a record of effectively promoting new technologies in a neutral way while ensuring that creators benefit and are paid. And I believe it is essential that Congress do so again today.

PREPARED STATEMENT OF STATEMENT OF ANN CHAITOVITZ, DIRECTOR OF SOUND
RECORDINGS AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS

INTRODUCTION

My name is Ann Chaitovitz, and I am the Director of Sound Recordings for the American Federation of Television and Radio Artists (AFTRA). On behalf of the over 80,000 performers and newsmen in AFTRA, I appreciate the opportunity to submit this testimony on behalf of performers. These hearings are extremely important to our members because new technology presents many challenges, as well as many opportunities, for performers. As a result of our country's intellectual property laws, developed under the leadership of this Committee, America creates the pre-eminent entertainment in the world and entertainment product is our leading export. In order to continue producing the finest and most sought after artistic creations in the world, the U.S. must ensure that artist incentives to create are nurtured, artists are fairly compensated for the exploitation of their work and that present and future streams of income are shared with the creators.

Music is marketed to the world by major American industries. But individual artists—singers, musicians and songwriters—are at the heart of the success of these major industries. It is the training, dedication, talent and creative verve of these individuals that make the original works of art upon which our successful industries are based. The artistic community, however, now faces a most serious challenge. New technological services enable people to obtain their artistic creations in new ways, often without payment of any sort to the creators and owners of those products. Should this trend continue, the incentive to create will decrease, sales will decrease and the direct income earned by artists will be reduced significantly. That reduction in earnings will also decrease or even eliminate performers' health and pension benefits.

Please understand that AFTRA wholeheartedly supports the development of new technologies. Technology will allow our members' creative talents to be easily disseminated to an ever-increasing audience and that, we believe, benefits everyone. However, the new technologies should work for the benefit of creative talent, provide compensation to copyright owners and creators of sound recordings and, certainly, should not result in detriment to performers.

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS

AFTRA is a national labor union representing over 80,000 performers and newsmen that are employed in the news, entertainment, advertising and sound recording industries. Our membership includes television and radio performers and approximately 15,000 singers, rap artists, narrators and other vocalists on sound recordings ("Singers"), including roughly 4,000 Singers who receive payments for the sale/distribution of each recording pursuant to a royalty contract ("Royalty Artists") and 11,000 singers who are not signed to a royalty contract ("Background Singers").

On behalf of the 15,000 Singers that it represents, AFTRA negotiates the AFTRA National Code of Fair Practice for Sound Recordings (the "Sound Recordings Code"). The Sound Recordings Code has been signed by an approximately 1200 record labels, including all of the major labels. Under the Sound Recordings Code, signatory record companies are required to contribute amounts to the AFTRA Health and Retirement Funds on behalf of the Singers who perform on a recording. Those contributions are based upon a percentage of each individual Singer's earnings. The AFTRA Health Fund provides health benefits to Singers who reach certain threshold levels of earnings (which include royalties) upon which contributions are made by the record labels. The AFTRA Retirement Fund provides pension benefits to Singers based upon the amount of the individual Singer's earnings throughout his/her career. In short, the health and pension benefits that each Singer receives are dependent upon the amount of earnings on which employer contributions are made.

In addition to bargaining and administering the Sound Recordings Code, AFTRA also actively participates in all facets of public policy development affecting our membership, frequently pursuing national and international legislation and treaties that protect Singers' rights, as well as joining issues in litigation that are critical to our memberships' interests.

SINGER COMPENSATION

Many people harbor misconceptions about the music industry and performers and how performers are paid. Basically, as the name implies, in addition to the small session fee required by the Sound Recordings Code, Royalty Artists receive a royalty for the sale or distribution of each recording and do not receive a fee for making

an album. In fact, the Royalty Artist must pay for all of the production costs of the album, *and typically pay 50%* of the independent promotion costs, 50% of the costs of videos and 50–100% of the

tour costs. Artists often pay these costs with the help of an advance from the record company. However, artists must pay back their advances before they receive any royalty shares earned by their albums. This is called “recoupment.” Taking into account all the deductions, royalty artists generally receive between \$0.80 and \$2.40 for each recording sold, depending on the level of success of the artist when the royalty contract is signed. What often is not understood is that the artist does not receive any of this royalty money until the recording company has recouped these costs. It usually takes two or three years before even a successful artist receives his or her first royalty payment. As Sheryl Crow stated in a response to a question from Congresswoman Bono at a May 2000 House Judiciary Committee hearing, she did not receive any money until after her record had sold “three or four million copies.” And, very few records ever sell this many units. As an example, in 1999, nearly 39,000 recordings were released, but only 3 singles and 135 albums - 0.35%—were certified as selling three million units, and notably, many of these records had been selling over a number of years before finally reaching the three million unit sales mark in 1999.

To ensure that Congressional intent to share new revenues with the performers is realized and not thwarted, all compensation designated to be paid to featured performers should flow to them directly and not pass through any middlemen such as the record companies or their affiliates. If the money were to pass through the record companies, they would have the opportunity to recoup from these revenues, even if such recoupment is not pennitted. Moreover, there would be a delay in the performers’ payment, and it would be impossible for the performers to ensure that they are actually paid the amount mandated by Congress without conducting a costly, time-consuming and burdensome audit.

Under the Sound Recordings Code, background singers receive a session fee for their work in the recording studios and also additional payments *if* the records on which they perform reach certain sales plateaus. However, most records never meet any of these plateaus.

Thus, all Singers are compensated based on the sales of their recordings, and any decrease in record sales volume would directly and adversely impact both Royalty Artists and Background Singers. The decrease in earnings that would result from any decrease in recording sales volume will result in a corresponding decrease in the pension that a Singer would receive upon retirement and, further, may jeopardize a Singer’s eligibility for individual and family health coverage altogether.

THE FUTURE

In a society that treasures creative work, the artists’ incentives to create should not be thwarted by the advent of new technologies. Congress must ensure that artists are compensated for their work and should not assume others will “do the right thing.”

Because performers’ relationships with the record companies are very different than songwriters’ relationships with publishers, performers are not yet prepared to take a position either opposing or supporting compulsory licenses for interactive web performances of sound recordings. However, if Congress creates a new compulsory license for sound recordings, performers should share in the license fees collected. Moreover, as discussed above, the performers’ share must be paid to them directly and not recoupable by the record companies.

Many professional singers struggle to earn a living from their recorded performances. Even for those relatively few singers who have successful careers, almost all spent years struggling economically while they were honing their craft, building their careers and trying to obtain a recording contract. These singers deserve to have their work protected and be compensated whenever anyone exploits it by whatever means, analog or digital, new technology or old. Digital technology, however, presents a more serious threat to creators’ livelihood because millions of people may freely access high quality versions of a work. If Congress permits access without payment, American artists will suffer, and our country risks not only our ability to continue creating worldrenowned masterpieces but also our balance of trade.

Again, we appreciate the opportunity to submit this testimony on behalf of recording singers and look forward to working with the Committee and its staff as it addresses these copyright issues that are fundamental to our membership.

PREPARED STATEMENT SALLY GREENBERG, SENIOR PRODUCT SAFETY
COUNSEL, CONSUMER REPORTS

Consumers Union, a publisher of both *Consumer Reports*—a print magazine with 4.5 million paid subscribers—and a Web site with one of the Internet's largest paid subscriber bases, understands the importance and value of copyright protections. In our role as advocates for consumer and public interests, we also understand that copyright law is a delicate balance between the rights of those who create, compile, and distribute information and the ability of the public to get access to that information. We are, in a word, pro-consumer and pro-copyright. As Senator Hatch said last July at hearings on this same subject, we must protect the rights of the creator but we cannot in the name of copyright unduly burden consumers.

New technologies historically have challenged our system of protecting creative works through copyright, and required a balancing between the public's right to know and the limited monopoly rights of authors. Whether it was the printing press, the jukebox, the photocopier, cable television, or the Internet, these technologies have forced us to continually revisit the balance between the rights of authors and rights of users to have access to information and creative works. Promoting and fostering innovation is clearly the goal of intellectual property law, but with changing technology we will continue to debate what will best accomplish that goal.

When the VCR was introduced in the early 1980s, Jack Valenti, lobbying for the Motion Picture Industry Association of America, made the famous statement, or in retrospect, perhaps, overstatement that "the VCR is to the motion picture industry and the American public what the Boston strangler is to the woman alone." Of course, we now know the real end to the VCR story—videocassette sales and rentals are now one of the most lucrative slices of the industry's copyright pie. Had it not been for judicious policyinakers and judges, the story of VCRs might have had a very different ending—consumers could just as easily have been denied the benefits of the VCR if the industry's "Chicken Little" approach had prevailed. We are concerned that the recording industry's opposition to Napster and other peer-to-peer online systems may be more of the same.

While it is almost a cliché to speak of the Internet and information technologies as revolutionary, it is nonetheless accurate to say that the Internet has completely changed the way we gather and distribute information. I don't think anyone here would disagree that Internet and information technologies have been responsible for tremendous gains in productivity and an unrivaled period of economic expansion.

As the Internet has developed, several milestones were responsible for huge increases in users on the network: the creation of HTML, the programming language of the World Wide Web, enabling users of the network to exchange information in a common format, and the creation of Mosaic, the world's first generally accessible Web browser. And we believe that peer to peer networking is a milestone on par with these other developments.

Irrespective of the merits or legality of Napster's service, Napster has popularized the power of peer to peer networking. The first Web browser introduced to users the idea that they could instantly get access to information anywhere on the planet—what Napster has done is introduce millions of users to the idea that they can find information by connecting directly with other users.

We believe peer to peer networking, which allows individual users to share files with other users without going through a central location, has the potential to revolutionize the way we communicate and learn, but it is a model in its infancy. Actions that we take today can have the effect of facilitating the development of peer to peer networking, or chilling its development.

CU understands the concern of the recording industry that Napster users enjoy creative works without having to pay the artist or the recording company. This is a valid issue. We firmly believe that creators of artistic works, be they musicians, artists, authors, or others, must have financial incentives to continue their creative endeavors and should be fairly compensated for their work. Those who add value to their work, like recording studios, have a right to fair compensation, as well. Unfortunately, we believe the Napster debate has been reduced to the question of whether music should be free, and we believe that is the wrong question. Of course music should not be free.

But there is an important point we should not lose sight of— in a very short period of time, over 72 million people have installed Napster's online service and manifested a previously unimaginable demand for music distribution online. At the same time, that public demonstrated a previously unparalleled appetite for peer to peer information delivery.

We are concerned that shutting down Napster, and thereby sending a chilling message to other peer-to-peer online systems, will stifle the kind of innovation that,

brought us the Internet in the first place. The direction taken in response to Napster-like online music services will be instructive to every fledgling peer to peer service, and their network architecture will be directly influenced by legislative actions taken-or not taken-by this panel.

In the aftermath of the Federal court's preliminary injunction ordering Napster to cease providing free downloads of copyrighted music, where do we go? Despite the recording industry protestations that it has made and is making efforts to provide music online, it appears to us that at this moment, the recording companies that control the music business aren't giving consumers what they want. If ever there were a crystal clear indicator that the consumer demand is there, Napster is it. So why have the major labels not stepped up and given consumers what they are asking for?

To boil it down in even simpler terms, we have new technology and we have great consumer demand for that technology. But we have an inefficient marketplace and that prevents the new technology from operating in a way that appropriately balances the competing needs of copyright owners and the public's right to receive information.

We suspect that the recording industry is resistant to changing the status quo and adapting to consumer demand for getting music online to protect current profit margins. According to columnist Thomas Weber writing in the *Wall Street Journal* last week, \$1.50 or less of a CD priced at \$15, goes to the artist.¹ Add in composer's royalties, manufacturing, packaging, and distribution costs and you're only talking about \$5 of the total price. \$5 goes to the retailer, and the record company gets \$5 for marketing costs and profit. But the record company also gets a portion of the manufacturing, packaging and distribution costs through its subsidiaries, so each 66cost item" in that chain also may generate profit for them.

Therein lies the problem for consumers. The public demand for online music cries out for a transformation of the way music is delivered, but the recording industry has strong disincentives from transforming their current distribution and marketing system. With the courts ordering Napster to stop providing free downloads of copyrighted music, the recording industry failing to respond to Napster's offers to set up a subscriber service, for which they have offered to pay the recording industry a lump sum of one billion dollars over five years, and the industry's failure to offer the same Napster-style service to consumers themselves, we appear to be at an impasse. And so consumers turn to Congress to properly balance the interests at stake.

We believe the recording industry also fears that online distribution of music could result in total disintermediation. In other words, what if consumers have the means to bypass the label entirely, connecting directly to an artist's Web site and cutting the recording company out of the transaction entirely?

Indeed, the recording industry has demonstrated through its actions that it is entirely aware of this possibility by waging a war on the *technologies* of online music distribution, rather than going after *uses of those technologies*. Over the last few years, Congress has already passed the No Electronic Theft Act of 1997 and the Digital Millennium Copyright Act in 1998, both of which would allow the Recording Industry Association of America (RIAA) to go after individuals who are illegally copying. But the recording industry seems not to be going after individual violators; their real interest seems to be in going after the technology. They realize that with 72 million people installing Napster, they cannot all be made criminals. Regrettably, the recording industry appears to be attacking innovation more than it is attacking piracy.

Consumers are paying the price doubly: they are faced with fewer choices and are paying higher prices for those choices. It also appears that the recording industry may be using litigation as a strong-arm business tactic to freeze the status quo and protect its profits. For instance, the Recording Industry Association of America (RIAA) sued MP3.com, a service that merely allowed users to take a CD that they legitimately bought and access it from any location through the Internet. As Michael Robinson of MP3.com testified here last summer, when MP3.com attempted to abide by a court order and get its system licensed, the company ran into a hornet's nest of different licensing agreements and spent large sums of money in the process. This for a service that simply gave users the ability to get online access to music they legitimately purchased and owned. MP3.com's experience is hardly incentive for other Internet innovations.

We have another concern that may contribute to the diminishment of rights consumers now have. In the offline world, once an individual purchases a copy of music, that individual is allowed to give or sell that copy to anyone he or she pleases, oth-

¹ Weber, Thomas. "Why Gutting Napster Won't Cure the Blues of the Music Industry." *Wall Street Journal*, March 26, 2001.

erwise known as the first sale doctrine.² Yet in the online world, first sale is rapidly disappearing. CU acknowledges that when the first sale doctrine was first contemplated, peer-to-peer online capability didn't exist. That is why we think Congress should take a look at this issue as well.

Congress has a model for addressing and balancing interests to arrive at a fair and equitable balance between copyright owners, creative artists, and the public. Last July, when this panel last held hearings on this issue, Senator Leahy expressed hope that the parties might work together toward some mutual agreement, otherwise there will be pressure on Congress to create statutory compulsory licenses. That hearing happened before the preliminary injunction against Napster was in place, and before Napster had offered to pay the recording industry \$1 billion to license Napster to offer its users paid subscriptions. To our knowledge, the industry, with the exception of Bertelsmann, has flatly rejected that offer and has made no counteroffer. We have neither heard of nor seen any signs of progress. Meanwhile, consumers continue to be deprived of access, for a reasonable fee, to the kind of online service that Napster was providing. We believe the need for Congressional action is even more urgent today than it was last July. In that vein, Consumers Union believes the best approach would be one that has been tested and proved successful for other new technologies. We propose the establishment of a compulsory licensing mechanism through which Napster and other online music providers would have a legal avenue for the 72 million people who have installed Napster. The compulsory licensing system supercedes the normal marketing mechanism for distributing copyrighted works and allows the prospective user the right to obtain a compulsory license under which he or she can use the work without the copyright owner's permission. In this way, we believe that Congress would help peer to peer networking to realize its full potential.

Congress has set up compulsory licensing systems in several instances (one repealed pertaining to jukebox licensing), each outlined below.

- The Mechanical License, Congress in 1909 created a right against the reproduction of musical compositions in mechanical forms (piano rolls). Congress limited this right however, through the creation of a mechanical compulsory license for musical works.
- The Cable License of Section 111 establishes a compulsory license for secondary transmissions by cable television systems.
- The Satellite Retransmission License establishes a compulsory license for satellite retransmissions to the public for private viewing.
- The Audio Home Recording Act, establishes compulsory licensing-like system by providing immunity from liability for copyright infringement by manufacturers and importers of digital recording devices, but imposes a levy on these devices, the proceeds from which are to be distributed to copyright owners.

We urge this Committee use these models to authorize a Copyright Arbitration Royalty Panel, or CARP, to resolve the disputes over the issue of music royalties between Napster and other peer-to-peer online service, and the recording industry. We also urge the panel to set a time limit in the law to finalize royalties, so that the parties are not debating the issue 3 years down the road, with consumers still left out in the cold.

While we realize fully that rights holders tend to dislike compulsory licensingsystems, these systems are products of political compromise; they serve both owners and users by reducing the transaction costs involved in licensing works through the private market system. Compulsory licensing has worked well in other contexts where we have supported it. For instance, CU is on record supporting compulsory licensing for both cable and satellite transmission entities. CU's Gene Kimmelman told the Senate Commerce Committee in 1998 and 1999 that by "eliminating the transaction costs associated with thousands of copyright clearing negotiations, the compulsory license ensures fair compensation to copyright holders while also providing consumers greater opportunity to receive multichannel video programming from a variety of vendors." Those principles apply to music, as they do to cable and satellite. Indeed, without compulsory licensing mechanisms for satellite or cable systems, consumers would not have had access to a broad range of programming and we don't believe these technologies could have flourished. Compulsory licensing provides a fair profit to owners of the copyright while ensuring that the public has access to creative works.

Compulsory licensing has not only provided consumers with greater choice, it also spurred competition. Imagine if Congress had not acted to provide a compulsory license in the case of satellite retransmission of broadcast signals. The only truly via-

²The first sale doctrine was incorporated into the 1909 Act in 17 U.S.C. Section 27 (1909 Act).

ble potential competitor to cable monopolies—direct broadcast satellite—would not be in a position to offer consumers an alternative to cable.

We support compulsory licensing because we believe that “killer applications” like Napster will encourage the rollout of broadband Internet services, just as email and instant messaging were responsible for huge growth in the narrowband Internet. Congressional action will be instrumental in greasing the wheels to facilitate this process, thereby bringing users of Napster and other peer-to-peer technologies into the sanctioned marketplace.

Consumers Union is concerned that unless Congress provides for compulsory licensing, a tried-and-true system that has worked in the past to provide the consumers with access to emerging technologies, we will see a chilling of innovation and competition, and consumers will be the losers.



May 15, 2001

The Honorable Howard Coble
The Honorable Howard Berman
Subcommittee on the Courts, the Internet
and Intellectual Property
House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Coble and Congressman Berman:

The numerous challenges surrounding the electronic distribution of music over the Internet have garnered much public attention, and we know that they are of interest to your Subcommittee and the Congress generally. In advance of your May 17, 2001 hearing concerning Music on the Internet, we thought it would be helpful to provide a brief overview of some of the issues that record companies and their business partners have faced as they have tried to launch new digital music services. We respectfully request that you make this letter a part of the record of the upcoming hearing.

Record Companies Are Responding to the Demand for Digital Music Services

There is a pressing need in the marketplace for legitimate digital music services, driven by the dual forces of exploding consumer demand and a proliferation of infringing services. To meet this demand, record companies and the service providers they have authorized to use their recordings are aggressively preparing to launch new digital music services. Our member companies have issued numerous licenses to Internet music services and are in the process of developing and launching subscription music services, or partnering with others to do so, that promise to provide users with access to vast catalogs of recorded music.

Uncertainties About Musical Work Rights

Unfortunately, the recording industry's attempts to meet consumer demand with legitimate digital music services have been slowed by uncertainty in the legal landscape and disagreements with music publishers that we have not yet been able to resolve. As you know, every recording actually embodies two copyrighted works: a "sound recording" (in which the copyright is typically owned by a record company) and a

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“musical composition” (in which the copyright is typically owned by a music publisher). Unlike most other copyright owners, music publishers have chosen to license their compositions through two separate kinds of licensing agencies:

- The “**performance**” right is typically licensed through a “performing rights organization” like ASCAP or BMI. These societies license broadcasts, cable and satellite television, and Internet streaming, among other uses.
- The “**reproduction**” and “**distribution**” rights are frequently licensed through a “mechanical licensing” agency, such as The Harry Fox Agency. The mechanical license is obtained pursuant to a compulsory license enacted by Congress nearly a century ago. Once intended to cover the manufacture and sale of piano rolls, it now covers everything from cassettes and CDs to electronic music delivery that involves the reproduction and distribution of a specifically identifiable copy of a musical work.

Music publishers and their representatives have taken the position that Internet transmissions implicate all these rights, and as a result, that licenses must be obtained from each of their licensing agents for most forms of Internet music delivery.

Multiple Payment Claims for New Subscription Services

The legal uncertainties surrounding musical work rights have been particularly challenging with respect to some of the music delivery technologies likely to be used for new subscription services. Record companies and their partners plan to launch services that may, among other things, offer “on-demand streams” (transmissions that permit users to listen to the music they want anytime they want and as it is transmitted to them) and “limited downloads” (non-permanent downloads made using technology that causes the downloaded file to be available for listening only during a limited time or for a limited number of plays). RIAA’s members believe that songwriters and music publishers should be fully and fairly compensated for the use of their compositions, and are ready and willing to pay them as the law requires. However, because music publishers are represented by multiple licensing agencies, record companies and service providers have been met with multiple claims for payment for the same transmissions of on-demand streams. And even though the compulsory mechanical license clearly permits limited downloads, it is not clear which royalty rate category applies.

Uncertainties Have Inhibited the Launch of New Services

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Because there are no established rules regarding the use of musical compositions in electronic music delivery services, record companies and online services have been unable to explore the wide variety of possible business models for meeting consumer demand. In the present uncertain environment, every deal that has been concluded to bring music online has been burdened by protracted negotiations over responsibility for musical composition rights clearance and payment of mechanical royalties. And that uncertainty unquestionably has prevented other deals from happening.

Voluntary Negotiations Are Continuing, But Have Not Yet Been Successful

RIAA and its members have been negotiating with music publishers to find a business solution to this uncertainty that will allow for the prompt launch of services. However, those negotiations have not yet successfully resolved the matter, and music publishers have even suggested that the compulsory license enacted by Congress should be unavailable to record companies and their business partners until they reach voluntary agreements with music publishers. Indeed, music publishers have sued one of the major record companies to prevent its launch of a digital music service – even though it has mechanical licenses for all the songs used on the service.

Record Companies and Internet Companies Have Petitioned the Copyright Office for Rulings

In an effort to bring subscription services online as quickly as possible, RIAA has filed a petition urging the Copyright Office to conduct a rulemaking proceeding, and if necessary to convene a Copyright Arbitration Royalty Panel (“CARP”), to clarify the mechanical royalty obligations of companies offering new subscription music services. The Office is now taking comments on the advisability of conducting such a rulemaking. We believe that the Copyright Office could significantly advance the delivery of digital music to consumers if it fulfilled its statutory role of administering compulsory licenses by issuing rules addressing the classification of on-demand streams and limited downloads for purposes of the mechanical compulsory license.

Record Companies and Internet Companies Have Also Urged the Copyright Office to Establish Interim Licensing Procedures

We have also asked the Office to issue interim procedural rules to facilitate reliance on the compulsory license during the pendency of its rulemaking. The Office’s current procedures worked acceptably when a record company needed to clear rights to a dozen compositions at a time for a new CD release. But most people believe that for a digital music service to be viable, it will need to offer tens or hundreds of thousands of

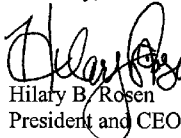
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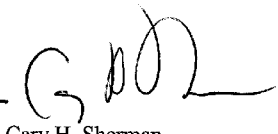
recordings. It is simply not practicable to obtain licenses for hundreds of thousands of musical works under existing procedures. They require the burdensome service of notices of intention, on a song-by-song basis, by certified or registered mail no less, after searching the records of the Copyright Office. It would be hard to imagine a procedure more poorly suited to the needs of those seeking to launch digital music services. If there is to be a mechanical compulsory license, there is no reason it should be so difficult to obtain. Thus, we have asked the Office to promulgate regulations that enable the compulsory license to operate more like the licensing of radio stations, and more like other compulsory licenses, so that a license could be obtained by making a single filing with the Office; in the absence of a rate determination, payments would become due once a royalty rate has been determined by voluntary negotiation or, if necessary, by arbitration. We believe Congress has given the Office the flexibility to promulgate such regulations, and we hope the Office will see the importance of addressing this urgent need.

* * *

We are committed to the new digital marketplace, and to working out the licensing issues and procedures necessary to launch the new services consumers demand. We appreciate your Subcommittee's interest in these issues and in helping to ensure the rapid development of legitimate online businesses. We would be delighted to update you and your colleagues on the Subcommittee as these matters develop.

Sincerely,


 Hilary B. Rosen
 President and CEO


 Cary H. Sherman
 Senior Executive VP and General Counsel

cc: Members, House Subcommittee on the Courts, the Internet
 and Intellectual Property

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